

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. —

LOUIS A. REILLY, AS POSTMASTER OF THE CITY
OF NEWARK, IN THE COUNTY OF ESSEX AND
STATE OF NEW JERSEY, PETITIONER,

vs.

JOSEPH J. PINKUS, TRADING AS AMERICAN
HEALTH AIDS COMPANY, ALSO KNOWN AS
ENERGY FOOD CENTER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

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1-2 United States District Court, District of New Jersey

Civil Ac. 5616

JOSEPH J. PINKUS, trading as American Health Aids Company also
as Energy Food Center, PLAINTIFF,

vs.

LOUIS A. REILLY, a Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, DEFENDANTS

Docket Entries

June 1, 1945: Complaint, filed.

June 1, 1945: Order to show cause re: restrain, filed (Fake).

June 4, 1945: Summons issued.

June 4, 1945: Notice of Allocation, filed (Newark).

June 11, 1945: Summons returned served on 6-5-45, on defend-
ants Frank C. Walker, Postmaster, Thorn Lord, U. S. Atty., and
Attorney General; served on Louis A. Reilly, Postmaster, 6-6-45,
filed.

June 11, 1945: Notice of Motion to dismiss complaint as to
defendant, Frank C. Walker, Postmaster, and acknowledgment of
service, filed.

June 11, 1945: Notice of motion to dismiss complaint as to de-
fendant Louis A. Reilly, and acknowledgment of service, filed.

June 11, 1945: Hearing on motion to restrain. Motions to quash
process of service and to dismiss action as to Frank C. Walker,
Postmaster General, and Louis A. Reilly, Postmaster. Decision
Reserved. Briefs to be submitted. (M).

July 18, 1945: Opinion, filed (m) (Permanently enjoins defend-
ant, Louis A. Reilly, Postmaster from carrying into effect the
fraud order issued by Postmaster General.)

July 23, 1945: Order dismissing proceedings against Frank C.
Walker, Postmaster General; denying application to dismiss pro-
ceedings against Louis A. Reilly, Postmaster, from carrying into
effect the fraud order issued by Postmaster General, etc., filed. (M).

July 26, 1945: Notice of entry of order of 7/23/45 sent Attys.

Aug. 13, 1945: Stipulation and order extending time to answer
or otherwise defend as to defendant, Louis A. Reilly, as Postmaster
of the City of Newark, filed (Fk).

Oct. 2, 1945: Answer to the Bill of Complaint for injunction,
filed.

June 7, 1946: Exhibits A and B (in three volumes), referred to in
the answer of Louis A. Reilly, Postmaster, filed.

June 12, 1946: Notice of motion for summary judgment, filed 6/11/46.

June 18, 1946: Affidavit of Service of Notice of Motion for Judgment on pleadings, filed June 17, 1946.

June 24, 1946: Hearing on motion for summary judgment behalf of defendant. Decision Reserved. (Meaney).

June 5, 1947: Opinion, filed 6/4/47 (Meaney) (Defendant's motion for summary judgment denied).

June 18, 1947: Notice of motion for Summary Judgment in favor of the plaintiff, with acknowledgment of service, filed (ret. 6/23/47).

June 23, 1947: Hearing on motion for summary judgment for plaintiff, Order to be submitted in conformity with the ruling of Court in opinion heretofore made. (Meaney).

June 24, 1947: Order denying defendants motion and granting plaintiff's motion for summary judgment, filed (Meaney).

June 24, 1947: Judgment for permanent injunction, in favor of plaintiff, Joseph J. Pinkus, trading as American Health Aids Company, also as Energy Food Center, and against the defendant,

3 Louis A. Reilly, as Postmaster of the City of Newark, in the County of Essex, and State of New Jersey, without costs, entered. (Notice mailed).

Sept. 24, 1947: Notice of Appeal, filed Sept. 19.

Sept. 24, 1947: Copies forwarded to the Clerk, U. S. C. C. A., and to Fast & Fast, Esqs.

Sept. 29, 1947: Designation of Contents of Record on Appeal, filed.

Oct. 6, 1947: Appellee's designation of Record on Appeal, filed.

Oct. 7, 1947: Stipulation and order to transmit original volumes of testimony to the U. S. C. C. A., re Record on Appeal, filed Oct. 6, (Meaney) Notice mailed.

4 United States District Court, District of New Jersey

5616

JOSEPH J. PINKUS, trading as American Health Aids Company also
as Energy Food Center, PLAINTIFF,

vs.

FRANK C. WALKER, Postmaster General of the United States, and
LOUIS A. REILLY, as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, DEFENDANTS

Bill of Complaint

Filed June 1, 1945

JOSEPH J. PINKUS, trading as American Health Aids Company,
also as Energy Food Center, shows to this Court and alleges:

1. That he is engaged in the business of distributing through the mails and in his store located at 871 Broad Street, Newark, New Jersey, a formula known as Dr. Phillip's Kelp-I-Dine Reducing Plan, which has for its purpose, reduction of excess fat.

2. That he caused advertisements to be inserted in many periodicals; that adherence to the reducing plan will reduce fat without discomfort, exercise or restriction to any special dietary regimen, except as set forth in the reducing plan.

3. That on the 23d day of November, 1944, plaintiff was served with a so-called memorandum of charges which called upon the plaintiff to appear before the Solicitor of the Post Office Department at Washington, D. C. Hearings were had which resulted in the making of an order on May 7, 1945, a copy of which order is annexed hereto and marked Exhibit "A" and made a part hereof.

5 4. It is alleged in the said order that the plaintiff was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of sections 259 and 732 of Title 39 U. S. Code. There is nothing in the memorandum for the Post Office General in embodying the finding of facts recommending the issuance of the fraud order which sets forth any fraud in law or in fact.

5. Offered in evidence by the Government at the hearing were certain exhibits, none of which were disputed as being false at the hearing. As for example,

"Doctors approve." "Please send me a two months' supply of Kelp-I-Dine. The first box brought wonderful results. I lost about 12 pounds and feel fine. Send it as soon as possible.

—Mrs. Millie Fama, 56 Seafoam Avenue, Singield Park, Linden, N. J."

"I have been using your Kelp-I-Dine which has been doing wonderful things for me. I lost six pounds in two weeks. When I told my best friend about it she asked me if I could get some for her. I am sending \$3.00. Please send a dollar package for my friend and a \$2.00 can for me. Miss Izziatti, 403 Boulevard, Bayonne, N. J."

"Enclosed please find \$1.00 for a one-month's supply of Kelp-I-Dine. Results were wonderful with the first can. I lost twelve pounds in two weeks. Please rush the order.—Mrs. McKinley, 810 Jim Street, San Antonio, Texas."

"For the enclosed \$2.00 please send me your large 3-months supply of Kelp-I-Dine. I have lost 18 pounds in 5 weeks and am not hungry. I feel better than I did before beginning the Kelp-I-Dine Reducing Plan. Please send the Kelp-I-Dine as soon as possible as I don't want to run out.—Gladys Whitney, 720 Fort Washington Avenue, N. Y."

"My doctor recommended that I take Kelp-I-Dine to reduce even though I was already taking the special tablets that he was giving me. I lost 18 pounds in 3 weeks."

"Even though I am diabetic, my doctor had me take Kelp-I-Dine. I lost 6 pounds in 10 weeks."

6 "I lost 14 pounds in 1 month with Kelp-I-Dine and I never get hungry. I am 62 years old and have two grandchildren."

Proof adduced by the Post Office Department also stated; in regard to the Plan:

"Doctor approved." "Wonderful, lost weight . . . gained pep." "Lost 18 pounds in 3 weeks." "Lost 21 pounds in 4 weeks." "I lost 15 pounds on my \$1.00 size Kelpidine." Mrs. M.D.

"I lost 4 inches around the hips on my first package of Kelp-I-Dine.—F.P.K., Paterson, N. J." "It works, I lost 10 pounds in two weeks.—S. K., Brooklyn, N. Y." "I went from 192 pounds to 176 pounds on my first package—a loss of 16 pounds.—N. J. J. R., Newark, N. J." "I lost 9 pounds in two weeks, and I feel much better. My doctor approved.—Mrs. B. F. Los Angeles, Calif."

There is no proof to indicate that these statements contained in testimonials sent to the plaintiff and offered by the Government are untrue.

6. Petitioner sets forth that he has received hundreds of testimonials stating that they were helped in reducing fat by following the formula presented in the Plan.

7. The hearing was held at the Solicitor's office by the Assistant Solicitor prosecuted by the Solicitor's office.

8. Annexed hereto and made a part hereof is a copy of the diet recommended by plaintiff as Dr. Phillip's Kelp-I-Dine Reducing Plan, marked Schedule "B".

9. Dr. Walter H. Eddy, noted authority on food, studied the Plan offered for sale by the plaintiff and which is the subject matter of the so-called fraud order, and agreed to the authenticity of claims made for it by this Plan and advertised the same over Station WOR. Plaintiff also used other radio stations to advertise his reducing plan.

10. That Dr. Joseph Thomas Roberts testified for the Government at the hearing before the Solicitor of the Post Office Department, but he has made no study of the subject matter and does not even know the medical name for Kelp-I-Dine, but stated that inspection of the list of foods on Dr. Phillip's Kelp-I-Dine Diet Reducing Plan indicates to him that it was similar to a low caloric diet, somewhere around one thousand or nine hundred caloric diet, 1200 possibly, that "we serve in hospitals or recommend commonly." He also stated at the hearing, "My guess would be that from inspection here it is a relatively low caloric diet for any adult." This doctor was also asked, "Doctor, would you say a diet giving a thousand calories per day generally cause a reduction of 3 to 5 pounds per week in obese persons who are not exercising, including walking, more than they formerly did?"

A. "I believe such a diet would cause an obese person to lose weight under those circumstances. Whether he would lose actually 3 to 5 pounds every week for an indefinite period of time I can't say but he would certainly lose weight on such a diet. He might lose more or he might lose a little less."

Also, he was asked:

"Now, Doctor, would in your opinion any person, regardless of age, sex or condition of health, who follows the Kelp-I-Dine Reducing Plan reduce fat and regain a shapely figure easily, quickly, naturally, surely, and without discomfort, exercise, or restriction to any special dietary regimen?"

Answer,

"Well, if an obese person followed ~~this~~ diet he would—".

Plaintiff represents that by the two words, "this diet", the Government expert was referring to Dr. Phillip's Kelp-I-Dine Reducing Plan.

11. Plaintiff sets forth that at the hearing before the Post Office officials, Government's counsel asked this question,

8 "Would in your opinion any person following Dr. Phillip's Reducing Plan lose from 3 to 5 pounds per week and at the same time eat plenty food without the necessity of cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content?"

And the Government's medical expert stated,

"Well, the patient would reduce weight if he followed this diet but many of those items of food which you mention do not appear on the diet list that is in this Exhibit 3-C. Therefore, one would presume that they would have to be cut out."

At the hearing before the Post Office officials in Washington, this same doctor, referring to Kelp-I-Dine, stated,

"The fact that I do not use it does not mean that other doctors might not."

He also stated that before he would change his mind as to the efficiency of Kelp-I-Dine, he would want to get the statement of another physician and would also want, critically and carefully, to see the results of the treatment. He was asked, in this connection, whether he would give an affirmative approval of the efficiency of Kelp-I-Dine in weight reducing if he examined the Standard Medical Dictionary by Steadman, the American Illustrated Medical Dictionary by Dorland, as well as Merck's, wherein the dosage used and the treatment of obesity is set forth, at which time, the presiding Assistant Solicitor stated,

"The Doctor is here to give expert opinion not an opinion as to the fairness of his testimony or the accuracy of his testimony."

The doctor, however, did admit that it would be possible for an individual to reduce to the extent of 3, 4 or 5 pounds per week, but not in every instance. He also admitted in his testimony that he could not say if anyone followed Dr. Phillip's Plan that it would have any ill effects. The doctor also testified that the usual cause for over-weight is eating too much, and stated that in his opinion a person who desired to reduce would have to eat less.

9 The question was then asked of the doctor whether the diet was an injurious one to a person who desired to reduce and doesn't have a heart condition or gout, or a kidney involvement, and he stated,

"Well, I think to a patient who is free from disease and wants to reduce that such a diet might be helpful to him and

might not be harmful, but that before he goes on or attempts to follow such a diet he should be examined by a competent physician and have his time of treatment observed rather closely by a physician for the detection of any harm that might arise."

The doctor also stated,

"Well, I believe Kelp-I-Dine with a low caloric diet, that is, if it is low enough and the patient follows the low caloric diet such patient will reduce weight."

A question asked him, was:

"With any harm to the patient?"

A. "In many cases it might be harmful to the patient."

Q. "In what cases?"

A. "Patients such as listed before, as those with the metabolic disorders which are very common in obese people, namely, diabetes, uremia, heart disease, high blood pressure, kidney disease, and so on."

Dr. Fred W. Norris, Senior Medical Officer of the Federal Food and Drug Administration, testified that Kelp-I-Dine was the same as kelp, the medical name being fucus, and that it was a seaweed. He stated that although he considered it worthless therapeutically, that he is willing to concede that it might be used as a preventive or as a means of supplying food iodine, a property value claimed for by this plaintiff, and that it can be used in place of iodized salt to supply iodine if that were lacking, as a preventive for iodine deficiency.

10 A question asked of this doctor,

"Doctor, would an obese person following either of these diets and taking 'Kelp-I-Dine' according to directions lose from three to five pounds of fat per week?"

His answer was,

"On a 900 or 1000 calorie diet persons do not on the average ordinarily lose from three to five pounds a week. They generally have to take a lower caloric diet than that, that is, if they don't increase their exercise. For this reason: In order to lose three pounds you have got to reduce your dietary intake about 1700 calories below what you ordinarily need, . . . And so, as a general rule, while he might lose three pounds in some cases, that wouldn't be the average loss of a 1000 calorie diet, or 900 calorie diet unless exercise is in-

creased. So you wouldn't expect ordinarily to lose four or five pounds, and generally wouldn't lose as much as three pounds even—some would."

Dr. Norris was asked of the value from a scientific point of view of Steadman's Medical Dictionary, and he stated that it was a compendium of reliable and unreliable medical thought. He was then asked whether he knew of any scientific medical textbook or other authority that recommended seaweed (kelp) as a treatment for obesity, and in that regard stated that he had heard of Dorland's Dictionary and Gould's Dictionary, as well as Steadman's Dictionary, that he had used them and when an attempt was made, in cross-examination, to ask him questions indicating that Dorland's, Gould's and Steadman's Dictionaries obtained statements contrary to those made by him, the learned Assistant Solicitor refused to permit that type of cross-examination. He also refused to permit introduction of these books in evidence, contrary to the authority of *Wittenberg v. Onsgard*, 78 Minn. 342; 47 LRA 141, *Baldwin v. Gaines*, 102 Atl. 338; 32 C. J. S., 575 which is the authority for the proposition that when a witness testifies as to what the authority shows or bases an opinion, in whole or in part, on what they advocate even though he mentions no

11 particular authority, a standard authority may be used to contradict his testimony, also such a work may be read in evidence to contradict a statement as to what the authorities do not state. These books were admitted by the Government medical authorities as being standard and well recognized works. Dr. Norris, in his testimony, admitted,

"I have not advanced the idea here that one-half teaspoonful of this kelp is dangerous or harmful in itself. There are people with diseases of the thyroid, tuberculosis perhaps, or diabetes and things of that sort, that larger doses of iodine might be harmful in. But with this small dose it would be very difficult to prove it is harmful and I haven't made any attempt to say that this preparation in itself is harmful."

He also stated that it would be possible for a woman to take Kelp-I-Dine in the dosage of one-half teaspoonful in the morning and Dr. Phillip's menu regularly for four weeks and lose seven pounds and feel well. He also stated in his examination after being asked whether if the diet and the Kelp-I-Dine were used regularly by a person who was willing to eat less so as to conform to Dr. Phillip's diet, such person would be harmed and his answer was,

"No. Some people could lose a pound or two a week and not be harmed, depending upon—a number of people can lose a pound or two a week and not be harmed and following this diet, too. But some of them may."

The Government doctor also stated,

"I said Dr. Phillip's menu, a thousand calories or possibly 800, or even if you got to 1200, would ordinarily reduce some poundage and some of them might get three pounds—I don't think that many would get four unless they take increased exercises above what they would and very few would get five under the same circumstances."

12. The plaintiff, before entering into his business, made a very comprehensive study of weight reducing. His testimony was that kelp was sold in more than three thousand health food stores in the country, selling it under various trade names like "Par-Kelp" or ordinary kelp. The plaintiff is also engaged in the health food business, conducting his store at 871 Broad Street, Newark, New Jersey, and previously conducted one in the City of Plainfield, New Jersey. He discovered, during the course of his business, that kelp is sold in large numbers to women who were trying to reduce. He had the kelp analyzed. He studied organic chemistry and in connection therewith learned much of the value of kelp as an aid in health reducing. He stated further that Kelp-I-Dine is pure kelp, known as fucus and bladder-wrack. Besides studying organic chemistry he also studied inorganic chemistry. Before putting Dr. Phillip's Kelp-I-Dine Reducing Plan on the market, he had consulted practicing physicians. During the proceedings, the Assistant Solicitor acting as a hearer, stated,

"Well, the mere fact that he discussed the uses of kelp with doctors would show that he made some effort to get scientific information about it which would be at least helpful in establishing the good faith on his part. But when you let that go into the record as doctors approving it for the treatment of obesity, you are getting into the field of expert testimony. And I don't believe that it is competent because it would be utter hearsay."

13. Plaintiff sets forth that his consultation with practicing physicians shows not only his good faith, but also his preparation for the production and distribution of his product.

14. The Plaintiff further examined medical dictionaries and works on fucus, medical name for kelp, made experiments with live animals at the Kirksville College of Osteopathy in Missouri, where he attended as a student.

15. The plaintiff contacted and obtained the approval of his product from such authorities as the Health Officer of the City of Newark, New Jersey, Dr. Charles V. Craster, and Dr. David Robins.

16. The plaintiff presented at the hearing before the Post Office Department, Dr. Altounian, who has been practicing medicine in this country for twenty-four years and is a member of the American Medical Association who stated, amongst other things, in his testimony, that iodine or iodine preparations, like kelp, are anti-fats and are used for reducing, that with Kelp-I-Dine and with Dr. Phillip's diet, a person would be apt to reduce in weight and could lose from three to five pounds in a week, and that he would have sufficient calories for his needs; that he would not be harmed in any way; that he examined medical books in preparation for his testimony, including dictionaries and medical works. He testified that a pharmacopœia recognized by the American Medical Association recognizes the effect of iodine in reducing fat; that it is an anti-fat and increases the metabolism; that iodine helps to reduce weight; that fucus is an anti-fat and that it is generally felt that obesity is bad for a person; also that Kelp-I-Dine causes weight reduction because of its iodine contents. He also testified that a person could eat ice cream, pie, cake and bananas and could still lose weight if he used Kelp-I-Dine and Dr. Phillips' Plan, which, of course, calls for cutting down of these foods. He also testified that Dr. Phillip's Reducing Plan would curb the appetite and that

14 when Kelp-I-Dine is taken, the iodine increases the metabolism, burning up fat. He corroborated all of the claims made for the Plan by the plaintiff, also agreed with the Government's witness that Kelp-I-Dine is harmless, that the diet alone would cause a reduction in weight and that Kelp-I-Dine would be an aid to reducing, that reducing by this method is not hard and is a comparatively easy way to reduce. The doctor was also asked, on cross-examination, whether he thought that the Plan could be sold indiscriminately to the public and that he stated that it could. Likewise, he was asked whether he knew of any textbook which states that iodine increases metabolism and he stated that he did. For example, the Handbook of Nutrition, written by the American Medical Association. On cross-examination, he was asked.

"Was it your opinion that if would lose (referring to Kelp-I-Dine) 3 to 5 pounds a week before you looked at this or when you just looked at Dr. Craster's letter you agreed with him because he is an authority?"

A. "Yes."

He also stated that after seeing Dr. Craster's letter he agreed that the diet and Kelp-I-Dine, if taken regularly, would cause one to lose 3 to 5 pounds a week. He also stated that three-tenths of a milligram, which is the amount used in Dr. Phillip's Plan, is a therapeutic dose.

17. Annexed hereto and made a part hereof are statements taken from Steadman's Medical Dictionary, The American Illustrated Medical Dictionary, The Dispensatory of the United States of America by H. C. Wood, Jr., and A. Osol, The Merck Index, Pharmacotherapeutics, Materia Medica & Drug Action, Gould's Medical Dictionary, The National Formulary, Journal of Pharmacology and Experimental Therapeutics, Dublin Journal of the Medical Sciences.

15 18. That the order of May 7, 1945, is arbitrary, capricious and unwarranted, that such action exceeds the authority of the aforesaid Department under the statutes in such cases made and provided, violates plaintiff's rights under the First Amendment to the Constitution.

19. The plaintiff has no adequate remedy at law.

20. That the business in which the plaintiff was engaged does not in any respect violate the provisions of sections 259 and 732 of Title 39 U. S. Code.

21. Plaintiff claims that the Court has jurisdiction under Title 28 of the U. S. Code, section 41 paragraph 16 and also in section 41 paragraph 1 of the same, in that the controversy here involved attacks the constitutionality of the law of the United States and is between persons of diverse citizenship and involves an amount in excess of \$3,000.00.

Wherefore, your petitioner respectfully prays this Court shall issue a writ permanently enjoining the defendant, Postmaster General Frank C. Walker, and Louis A. Reilly, Postmaster of the City of Newark, and those exercising authority under them, from banning or refusing to accept for mailing, Dr. Phillip's Kelp-I-Dine Reducing Plan, or preparation known as Kelp-I-Dine, and for such other and further relief as the Court in its discretion may seem fit to grant.

Yours, etc.

FAST & FAST,
Attorneys for Plaintiff,
Office and P. O. Address,
60 Park Place,
Newark 2, New Jersey.

LOUIS A. FAST,
Of Counsel.

Affidavit of Joseph J. Pinkus

UNITED STATES OF AMERICA,
State and District of New Jersey, ss:
County of Essex.

JOSEPH J. PINKUS, being duly sworn on his oath according to law deposes and says:

1. He is the plaintiff in these proceedings and he has read the bill of complaint and states that the contents thereof are true to the best of his knowledge, information and belief.

2. The plaintiff was engaged, until the so-called fraud order was filed, in mailing Dr. Phillip's Kelp-I-Dine Reducing Diet; that since the making of the said order he has been denied the privilege of the mails and that he has therefore suffered immediate and irreparable injury, loss and damage, and that he will continue to do so until the granting of an injunction restraining the Postmaster General and the Postmaster of the City of Newark from interfering with his right to the use of the mails.

3. That annexed hereto and made a part hereof are the advertisements used by the plaintiff in connection with his business.

4. This deponent further states that he was not engaged in any fraud and that there was no proof of any fraud at the hearing before the Solicitor General as shown by the bill of complaint.

5. Plaintiff incorporates the facts of the bill of complaint to the same force and effect as if they were herein fully set out at length.

JOSEPH J. PINKUS.

Sworn to and subscribed before me this 18th day: of May, 1945.

HELENE R. BUSCH,
A Notary Public of New Jersey.

My Commission Expires November 16, 1946.

Schedule "A"

POST OFFICE DEPARTMENT, WASHINGTON

Order No. 27936

May 7, 1945.

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that American Health Aids Company and Energy Food Center, and their officers and agents as such, at Newark, New Jersey, are engaged in conducting a scheme or device

for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the memorandum of the Solicitor for the Post Office Department of the date of May 3, 1945, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concerns & parties and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concerns & parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Signed) FRANK C. WALKER,
Postmaster General.

(Case No. 44210-F)

To the Postmaster:
Newark, New Jersey.

18 Post Office Department, Office of the Solicitor
Washington 25, D. C.

May 3, 1945.

F. & L. Docket 14/303

In the Matter of Charges That

AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER; both at Newark, New Jersey; American Institute of Food Products; Walter H. Eddy; Walter H. Eddy, Ph.D.; Walter H. Eddy, Ph.D., President; Dr. Walter H. Eddy, Ph.D.; and Robert A. Bories, General Manager, all at New York, New York,

are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representa-

tions and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended).

Memorandum for the Postmaster General Embodying a Finding of Fact and Recommending the Issuance of a Fraud Order

The memorandum of charges in this case is dated November 23, 1944. Letters of the same date were addressed to all of the concerns and parties named in caption hereof, calling upon them to show cause on December 15, 1944, at this office, why a fraud order should not be issued against them. Said letters and copies of the memorandum of charges transmitted therewith were delivered to said concerns and parties. The hearing of the case was continued to January 10, 1945. The evidence shows that Joseph J. Pinkus is the sole owner of the business conducted under the trade name of "American Health Aids Company", which business was formerly operated by him under the name of "Energy Food Center", and he is herein referred to as the respondent.

19 The respondent Pinkus appeared in person and was represented by counsel at the hearing held January 10, 1945. The other concerns and parties named in the caption hereof, and shown therein to be located at New York, New York, made no appearance and were not represented by counsel at the hearing. The transcript of the hearing, consisting of 354 typewritten pages, is by reference made a part hereof. A copy of the transcript was loaned to the attorney for the respondent and he was given opportunity to file a brief and proposed findings of fact and of law. The entire record, including all documents and exhibits and the brief filed on behalf of the respondent, was carefully considered before finding the facts and making the recommendations hereinafter appearing, and the record is submitted herewith.

In the memorandum of charges the concerns and individuals named in the caption hereof are charged with conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of 39 U. S. Code 259 and 732. It is averred therein that said scheme is in substance and effect as follows:

Said concerns and persons are obtaining and attempting to obtain various remittances of money through the mails from divers persons in payment for a product known as "Kelp-I-Dine" and a treatment known as "Dr. Phillip's Kelp-I-Dine Reducing Plan" for the reduction of excess fat, upon pretenses, representations, and promises contained in written and printed matter sent through the mails to the effect:

That any person, regardless of age, sex or condition of health, who follows the Kelp-I-Dine Reducing Plan will reduce fat and regain a "shapely figure" easily, quickly, naturally, surely, and without discomfort, exercise, or restriction to any special dietary regimen;

20 That any person following Dr. Phillip's Kelp-I-Dine Reducing Plan will lose 3 to 5 pounds per week and at the same time "eat plenty" food without the necessity of cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content;

That any person following Kelp-I-Dine Plan as directed will lose weight quickly, easily, safely, and regain a shapely figure without experiencing hunger;

That Kelp-I-Dine contains minerals (including essential iodine) that satisfy hidden hunger, false hunger that makes people overeat and add weight;

That all doctors approve of the use of Kelp-I-Dine Reducing Plan in every case regardless of the age, sex, or condition of the user;

Whereas, in truth and in fact, all of the aforesaid pretenses, representations and promises are false and fraudulent.

The respondent filed no written answer but at the hearing made an oral plea of general denial of the charges against him.

The business of the respondent is operated at Newark, New Jersey. He is engaged in selling through the mails a treatment for obesity called "Dr. Phillip's Kelp-I-Dine Reducing Plan", which treatment includes a preparation known as "Kelp-I-Dine". The treatment consists of a prescribed diet and one half teaspoonful of "Kelp-I-Dine" per day taken "preferably at breakfast". The evidence shows that the prescribed diet provides between 800 and 1200 calories per day. Kelp-I-Dine is a Pacific Kelp or a dried sea weed. Chemical analyses in evidence show that one-half teaspoonful of this kelp contains .4 milligram of iodine and small quantities of other minerals. (R. 45, 76, 134, 135, 234, 241, 259; Gov. Exs. 3, 4, 5, and 6; Resp. Ex. 1).

The treatment of the respondent is advertised in newspapers and magazines of national circulation, and there are in evidence advertisements, of the respondent from various issues of such publications from August, 1944, to February, 1945. Each of said advertisements contains a picture of a shapely young woman in a bathing suit beside scales. Each also contains an order blank addressed to the "American Healthaids Co." in which there is an

21 offer of refund to any dissatisfied customer which is called a "money back guarantee". (Gov. Ex. 2) The following are quotations from three of such advertisements which are in evidence:

Reduce

Lose 3 to 5 lbs. a Week No Exercise Required. No Reducing Drugs, Absolutely Harmless. Yet Eat Plenty, Follow Kelp-I-Dine Reducing Plan. Simply take a half teaspoonful of Kelp-I-Dine with any meal (preferably at breakfast). Eat as You Usually Do. Don't Cut Out fatty, starchy foods, just Cut Down on them. That's all there is to it!

Send for Kelp-I-Dine Today

• • • • •

Users Say: "I lost 15 pounds on my \$1.00 size Kelpidina."

Mrs. M. D.

I ate Everything I usually do and still Lost 13 pounds.

Mrs. J. M.

Free To Try

You can try Kelp-I-Dine without it costing you a cent. Just order with the coupon and if you find Kelp-I-Dine does not help you lose weight, return the remainder to us and we will refund your money in full. Nothing could be fairer. Act Now!

Here is pictured a young woman in bathing suit, toe touching scales.

(Gov. Ex. 2-B)

Reduce Safely

- No Exercise
- No Reducing Drugs
- Absolutely Harmless

Lose 3 to 5 lbs. a Week yet eat plenty!

Follow the Kelp-I-Dine Reducing Plan.

Simply take a half teaspoonful of Kelp-I-Dine with any meal (preferably at breakfast). Eat as You Usually Do. Don't Cut Out fatty, starchy foods, just Cut Down on them. That's all there is to it!

Users Say: "Doctor approved." "Makes one feel wonderful." "Lost 15 pounds in 5 weeks." "Feel so much better." "Lost 21 pounds in 4 weeks."

• • • • •

Here is pictured a young woman in bathing suit, toe touching scales.

Here is pictured a young woman in bathing suit, standing with arm raised.

How To Quickly, Safely Reduce
the lazy way

No Strain, Doctors Approve

Lose 3 to 5 lbs a Week . . .

yet Eat Plenty!

Lose inches of fat from abdomen, hips, thighs. Follow the Kelp-I-Dine Reducing Plan. Simply take a half teaspoonful of Kelp-I-Dine just once a day, at any meal. Eat As You Usually Do. Don't Cut Out fatty, starchy foods; just cut down on them. That's All There Is To It. Safe, Sure. Lose excess weight Naturally and Safely. You won't feel hungry while you take off pounds and inches. So stop wishing . . . and start getting back your slender lines. Reduce this Lazy Way. Without strain or nervous irritation. Look and feel years younger. Send \$1.00 now for the Kelp-I-Dine Reducing Plan and a full 30-day supply of Kelp-I-Dine.

- No Exercise
- No Harmful Drugs
- Absolutely Harmless

\$1.00 Full 30-Day Supply

• • • • •

Look Better!

Feel Better!

Regain your shapely figure. Kelp-I-Dine is absolutely harmless.

Grateful users say: "Doctor approved." "Wonderful, lost weight . . . gained pep." "Lost 18 pounds in 3 weeks." "Lost 21 pounds in 4 weeks."

• • • • •

(Gov. Exhibit 2-E)

The evidence shows that the respondent also advertises his treatment through various radio broadcasting stations. In such radio advertising orders and remittance of money through the mails are solicited. There are in evidence the scripts used for such purpose at one radio station, from which the following are quotations:

****If you want to lose three to five pounds a week, safely, quickly, easily, the best way of losing weight is to just follow the Kelp-I-Dine Plan. Take a half teaspoonful of Kelp-I-Dine with any meal, preferably at breakfast—eat sensibly, and that's all there is to it. With Kelpidine you don't cut out bread, potatoes, or the other nice things you like to eat . . . just cut down on them. ****

23

(Gov. Exhibit 2-R-4)

****Are you carrying around a lot of excess weight? Have you noticed that you don't look as well as you used to in a bathing suit? There is now a new, sensational scientific and guaranteed plan for reducing . . . that Kelpidine Plan, that helps you lose three to five pounds a week and permits you to eat such things as ice cream, cake, candy, beer and all the other things you like. Remember with the Kelpidine Plan, you don't cut out ice cream, cake, candy, or any other things you like to eat. You just cut down on them. It's the new Kelpidine Plan, approved by doctors. ****

(Gov. Exhibit 2-R-5)

****You, too can lose weight with Kelpidine, it makes no difference if you are 16 or 60, or if you have diabetes, rheumatism or any other ailment. Kelpidine is always safe and doctors approve the Kelpidine plan. You simply take a half teaspoon of Kelpidine once each day and eat three regular sensible meals. Kelpidine decreases your appetite.**

(Gov. Exhibit 2-R-6)

The respondent also uses printed circulars which are sent through the mails to advertise his treatment. The following are quotations from said printed circulars:

Have a Slender Figure . . . Without Starving! Reduce Sensibly . . . Without Exercising Improve your Looks! Feel Full of Pep! "Doctors Approve."

Users Say!

Kelp-I-Dine Offers a pleasant, scientific, guaranteed method of losing excess weight Reduce pleasantly, quickly, and, best

of all, easily. The new Kelp-I-Dine method is a simple way that requires little effort or trouble. It's a commonsense plan that employs the latest knowledge of nutrition . . . and it's free of harmful drugs, starvation diets, strenuous exercises, salts or physics. Your body is encouraged to use up its own fat, while supplying the system with the needed nutritive essentials. No tortuous diet is necessary . . . you merely correct those mistakes in eating that have probably made you fat and kept you fat. Your daily intake of food can be more than adequate . . . you eat plenty . . . you don't cut out starchy foods, you merely cut down on them! That's all there is to it! Kelp-I-Dine is a purely vegetable product. It contains the minerals (including essential iodine) that satisfy hidden hunger, the false hunger that makes people turn fat into energy . . . makes you feel full of pep. Thousands report using it with amazing results. It's the lazy way to reduce . . . to take off ugly, flabby fat.**

The Kelp-I-Dine Plan

1. Eat as much food as you want, but don't eat between meals.
2. Eat plenty of lean meat (broiled or boiled, not fried), plenty of green vegetables (cooked or raw), plenty of fruits (canned or the unsweetened variety). Drink milk. Preferably buttermilk.
3. Don't cut out potatoes, corn or beans entirely, cut down on them.
4. Don't eat thickened gravy or creamed soups, fried food, or excessive amounts of sweets.
5. Don't drink water with your meals, but drink at least four glasses of water between meals.
6. Walk as much as possible, but avoid strenuous exercise.
7. Don't tell anyone about your diet.
8. Don't drink alcoholic beverages.
9. Take one-half teaspoonful of Kelp-I-Dine with any juice or water, as directed on the label, (use it in place of salt).

(Gov. Exhibit 3-C)

Dr. Phillips' Kelpidine Reducing Plan

is the Lazy Way to reduce . . . to take off excess pounds and inches from the abdomen, hips and thighs quickly and safely.

You can slim down without doing tiresome exercises, without taking harmful reducing drugs, and without starving yourself.

Dr. Phillips' Kelpidine Reducing Plan will help you lose excess weight Naturally and Safely. You won't feel hungry while you slenderize and regain your shapely figure, because Dr. Phillips' Kelpidine Reducing Plan allows you to eat Three sensibly and satisfying meals each day. You Don't Cut Out bread, potatoes, gravy, etc.; you just cut down on them. And you take a half-teaspoonful of Kelpidine just once a day, with your breakfast of fruit juices, egg, toast and coffee. That's all there is to it. No exercises necessary. No harmful drugs. Absolutely harmless.

Dr. Phillips' Kelpidine Reducing Plan is a tested and sensible plan for people who want to lose weight Safely . . . at the rate of 3 to 5 pounds a week. Doctors approve of this method. The wonderful and beneficial results will amaze you.

* * * * *

To accomplish these results, a satisfactory reducing plan makes use of what may be called reducing menu aids; products which combine with a low-calorie diet to accomplish some or all of the desirable effects we have listed.

25 Kelpidine Is Such A Reducing Aid

It's used in conjunction with Dr. Phillips' low-calorie diet reducing plan. The addition of Kelpidine to this diet insures against iodine deficiencies, adds some bulk and reduces the feeling of hunger.*

(Gov. Exhibit 4-D)

* * * * *

The first rule for regaining a shapely figure is to stick to your diet and don't coddle a false appetite. Kelpidine is a great aid in giving you that feeling of "fullness" and satisfying the abnormal craving for food which your body does not really need.

(Gov. Exhibit 6-C)

The purchaser of the respondent's treatment receives a container with 2 ounces of Kelpidine and "suggested menu for one day" entitled "Dr. Phillips' Kelpidine Reducing Plan." The Kelpidine label states that it is a "A Pacific Kelp" and that it is "nutritional supplement for increasing daily intake of iodine from ocean vegeta-

tion." It is also stated upon the label that the daily dose of one-half teaspoonful of Kelpidine contains .3 milligrams of "food iodine", which amount is "300% of Minimum Human Daily requirements". It is nowhere stated upon the label that Kelpidine has value as a reducing agent or as an adjunct to a reducing diet.

(Gov. Exhibit 3)

The respondent claims that he now furnishes to the purchasers of his treatment a package of Kelpidine and a circular containing the so-called "Dr. Phillips' kelpidine Reducing Plan"; and that he has discontinued furnishing to purchasers the so-called "Kelp-I-Dine Plan" quoted above from Government Exhibit 3-C. The respondent testified that he had been called before a representative of the Federal Food and Drug Administration who objected to the aforesaid circular and advised the respondent against its use. Said representative had also objected to the label then used on

26 Kelpidine upon which appeared "a girl upon scales." The respondent testified that he thereafter discontinued furnishing the so-called "Kelp-I-Dine Plan" and substituted therefore the so-called "Dr. Phillips' Kelpidine Reducing Plan". The respondent introduced a letter of July 3, 1944, from the Federal Food and Drug Administration which referred therein to a label and a proposed circular. The respondent admitted that the circular referred to in said letter was entitled "Ways of Using Kelp-I-Dine" and contained no statement to the effect that the diet was a "reducing diet or treatment". He also admitted that the same was true of said label. The aforesaid letter refers to the "recent hearing" between the respondent and the aforesaid representative, and the respondent testified that after said hearing "he stopped immediately" sending out the circular which contained the so-called "Kelp-I-Dine Plan". However, there is in evidence one of said circulars which was received through test correspondence on August 14, 1944, and the date of aforesaid letter shows that said hearing was prior to July 3, 1944. (R. 225-228, 237-240; Gov. Exhibits 3-H and 3-C; respondent's Exhibits 2, 2-A and 2-B).

There appeared as witnesses for the Government a senior medical officer of the Food and Drug Administration, and a physician of Washington, D. C., who is likewise a Professor of Medicine at the Schools of Medicine at Georgetown University and George Washington University. There appeared as a witness for the respondent a physician of Newark, New Jersey. All three of said doctors were qualified to give expert medical testimony.

The medical testimony clearly establishes that any reduction in weight accomplished by the respondent's treatment is due entirely to the diet prescribed by him. The preparation sold with the diet, and given the trade name of Kelpidine, consists entirely of

27 Kelp. I find that kelp has no other therapeutic effect than that stated on the label upon the respondent's preparation which was approved by the Food and Drug Administration, namely, a "nutritional supplement for increasing daily intake of iodine from ocean vegetation." The medical testimony shows that the sole purpose of such an "intake of iodine" would be to prevent an iodine deficiency disease, and it further shows that except in certain limited areas of this country one will receive from the foods ordinarily consumed sufficient iodine to prevent such a deficiency disease. The evidence clearly establishes, and I so find, that kelp is valueless in the treatment of obesity. (R. 58-67, 80-86, 130-150, 309-313, 323-325; Gov. Ex. 3-K).

The respondent's medical expert testified that because of its iodine content, kelp is an "anti-fat for reducing" and "could be used in the treatment of obesity", but he admitted that he had never prescribed it for such purpose and knew of no doctor who did. He further admitted that his testimony concerning the effectiveness of Kelpidine and the Kelpidine Plan was based entirely upon a report of another doctor which he had seen and which did not express his own opinion upon the subject. Said expert testified that he and other doctors used the salts of iodine in the treatment of obesity, and claimed that it increases the metabolism and "burns up fat". He admitted, however, that the iodine in kelp was a "very small amount" and that the ordinary dosage of sodium iodine or potassium iodide, which he would prescribe in the treatment of obesity, would be "one gram three times a day". The daily intake of iodine from the prescribed one-half teaspoonful of the respondent's kelp would be but 4 milligrams. A milligram is one-thousandth of a gram. (R. 45, 258, 265, 285, 292, 295, 296, 329, 330).

28 While said medical expert testified that the minerals in kelp satisfy "hidden hunger", he admitted that he had never prescribed kelp for any patient and that the only test he had made of Kelpidine was that of putting some in his mouth and swallowing it with water. The evidence shows also that kelp will not "reduce the feeling of hunger" by adding "bulk" to a diet low in calories, as advertised by the respondent. (R. 133, 271, 292).

The medical testimony shows that the average American sustaining diet contains in excess of 2,000 calories and that the diet of the obese will ordinarily contain a considerably greater caloric intake. All of the medical experts agreed that the daily diet prescribed by the respondent provides about 1,000 calories which would be less than one-half of a sustaining diet. Even the respondent's medical expert agreed that said prescribed diet was a "rigid" or "severe" diet. The experts who appeared for the Government agreed that one following a daily diet of 1,000 calories would experience the discomforts and strain of hunger and that this would be particularly

true of an obese person accustomed to the overeating which had caused his condition. Said experts for the Government were as well agreed that the taking of a daily dose of one-half teaspoonful of kelp would not in any way reduce such hunger. While the expert for the respondent testified that one following the respondent's prescribed diet could do so "without feeling *very* hungry". He admitted that said diet was "rigid" and "severe" and that he had never heard of anyone who had reduced while taking kelp. He further admitted that iodine, the chief mineral ingredient of kelp, had a tendency to increase the appetite. (R. 60-67, 116, 134, 135, 276, 310, 315, 320).

It is shown by the medical testimony that the diet prescribed by the respondent is a reducing diet, the following of which would cause some reduction in weight varying in extent in various patients. Said diet might in some cases effect the reduction of three pounds per week but it would not ordinarily do so. In most cases the loss from restricted diet of as much as three pounds per week over an extended period would probably be harmful. Said diet may even produce serious results in patients with chronic diseases, particularly of the heart and kidneys, who are often unaware that they have such diseases. All of the medical experts agreed that treatments for obesity should be individualized and prescribed only after scientific diagnosis. (R. 104, 134-137, 176-179, 282, 283).

All of the medical testimony is to the effect that obesity is ordinarily caused by overeating, although in some cases there may be other contributing conditions and factors. The evidence shows that iodine deficiency diseases do not produce obesity, and that sufferers from such diseases may be either underweight or overweight. The same is true of other mineral deficiency diseases. The claims of the respondent concerning his product are based upon its iodine and other mineral contents. (R. 54, 131, 140, 153, 258, 271, 313, 314).

Every newspaper or magazine advertisement of the respondent, and practically every circular sent through the mails by him, contains the following statement:

Simply take a half teaspoonful of Kelp-I-Dine with any meal (preferably at breakfast). Eat As You Usually Do. Don't Cut Out fatty, starchy foods, just Cut Down on them. That's all there is to it!

(Gov. Exs. 2, 3, 4, 5, & 6)

The aforesaid language certainly gives the purchaser of the respondent's treatment for obesity, no notice whatever that he is purchasing merely a recommended diet which is considered "rigid"

30 and "severe" by the three medical experts who testified in this case. The purchaser is lead to believe by the advertising of the respondent that Kelpidine is a valuable product for the treatment of obesity, and the medical testimony in this case proves that it is valueless for such purpose. Such purchaser may effect some reduction in his weight if he follows diligently the prescribed diet of the respondent, but he will not be able to do so easily, quickly, naturally, surely, and without discomfort, as represented. If he follows the said diet, which provides a caloric intake of less than one-half of the average American sustaining diet, he will not be able to "eat plenty" not as he "usually does". Such purchaser may not be able by following said diet to reduce as much as three pounds per week, and if he should do so it would not be done safely or harmlessly, particularly if such rigid diet were not scientifically indicated in his individual case and of which fact he might not be aware. In no event could the purchaser follow said diet without experiencing hunger and the discomforts and strain thereof, because the medical testimony clearly establishes that kelp contains nothing which will prevent or satisfy hunger incident to following a rigid diet. Even the expert medical witness appearing for the respondent know of no doctor who prescribed kelp as an adjunct to diet in the treatment of obesity.

The findings of fact made herein are based only upon the medical testimony of the expert witnesses appearing on behalf of both the Government and the respondent. It is contended in the brief of the respondent that there should have been received in evidence the testimonials from users of the respondent's treatment which were offered by the respondent at the hearing, and that consideration should be given to the testimonials of such persons appearing in the advertisements of the respondent. The respondent had full opportunity, and availed himself thereof, to introduce the
31 testimony of an expert medical witness and this is the only evidence legally admissible to determine the question of the therapeutic value of the respondent's treatment.

The brief of the respondent also complains that certain medical dictionaries and other books were not permitted to be read in evidence for the purpose of showing the statements contained therein concerning the therapeutic effects of kelp. In spite of the ruling that such books were not admissible in evidence, the respondent has set forth in his brief extensive quotations from such dictionaries and books, all of which quotations have been read. If such quotations were considered as evidence in this case they could only establish what was conceded on cross examination by one of the expert medical witnesses for the Government, namely, that he has seen statements in medical dictionaries and other books that kelp was at one time used as a treatment for obesity or was reputed to

have some value in the treatment thereof. Said medical expert further testified, however, that he knows of no modern scientific medical textbook or other such authority which recommends kelp as a treatment for obesity or as an effective adjunct in connection with a reducing diet.

For the reasons herein set forth, I find that the respondent is engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732, as in the memorandum of charges averred.

The evidence shows that remittances were received through the mails in connection with the aforesaid scheme only by the respondent operating under the two trade names used by him, and that the other names set forth in the caption hereof appeared in the literature sent out by the respondent only as endorers of his aforesaid reducing plan. Therefore, in order to prevent the operation of this scheme it is not deemed necessary at this time that the fraud order include the names of American Institute of Food Products; Walter H. Eddy; Walter H. Eddy, Ph.D.; Walter H. Eddy, Ph.D., President; Dr. Walter H. Eddy, Ph.D.; and Robert A. Bories, General Manager, all at New York, New York.

I, therefore, recommend that a fraud order be issued against American Health Aids Company and Energy Food Center, and their officers and agents as such, at Newark, New Jersey.

(Signed) VINCENT M. MILES,
Solicitor.

33

Schedule "B"

Typical Suggested Kelp-I-Dine Diet

Breakfast

- 1/2 grapefruit, medium
- 1 boiled, poached or shirred egg
- 1 slice thinly buttered bread
- Coffee, with 3 tablespoons skimmed milk
- 1/2 teaspoonful Kelp-I-Dine

Lunch

2 crackers

- Egg salad, 2 hard-cooked eggs, sliced tomato, green pepper, celery, escarole, watercress and lettuce
- Jello, if desired

Dinner

Any consomme or clear soup.

Broiled cod fish or other lean fish

Steamed cauliflower, use $\frac{1}{2}$ small head with 1 tomato, 1 helping

Steamed rice, $\frac{1}{4}$ cup

Relish, lettuce and sliced cucumber, with dressing, 2 tablespoons

Fresh fruit salad, diced banana, 1 plum, $\frac{1}{2}$ tangerine, 1 helping

Coffee or tea with 3 tablespoons skimmed milk.

Do you want to LOSE those Extra pounds?

combine with a low-calorie diet, in which each one of the desirable effects we have listed.

Kelpidone Is Such a Reducing Aid

It's used in conjunction with Dr. Phillips' low-calorie diet reducing plan. The addition of Kelpidone to this diet insures against iodine deficiency, adds some bulk and reduces the feeling of hunger.

The following pages tell how to secure substantial weight reduction with Dr. Phillips' Kelpidone Reducing Plan.

Signed

Walter H. Eddy, M.D.
Walter H. Eddy, M.D.

American Institute of Food Products



Reduced by

The principles involved in weight reduction by diet are simple. To do the day's work, the body must have and burn a certain amount of fuel food stuffs. By reducing the amount of food intake we force it to burn up some of its own body fat. So a reducing diet is simply a low-calorie diet. But that low-calorie diet should be properly planned. To be fully satisfactory it must supply all the minerals and vitamins we require. It may be low in calories but it must supply all the groups we need for maintenance and repair of tissues. It must also satisfy hunger! must supply satisfying bulk without increasing calories, must satisfy the appetite.

To accomplish these results, a satisfactory reducing plan makes use of what may be called reducing menu aids; products which

Reduce Safely



TELLS HOW ON FOOD FORUM
STATION WOL
DR. PHILLIPS' KELPIDONE REDUCING PLAN

Amazing Results Reported by Users...

LOST 28 POUNDS

"After I started taking Kelpidone, I lost 106 pounds, and I weigh 167 pounds. I couldn't be without it."

—J. G. Bender, La.

LOST 40 POUNDS

"I used to weigh 180 pounds, but now I weigh 140 pounds."

—C. Windsor Locks, Conn.

LOST 15 POUNDS

"I lost 15 pounds and it sure has helped me. I have lost 15 pounds."

—Mrs. K. M. McFarland, Ala.

LOSE 3 to 5 Pounds a Week ... yet EAT PLENTY

If you want to get off in summer, lose fat that is making you look and feel more like a pig than you actually are.

The solution is DR. PHILLIPS' KELPIDINE REDUCING PLAN. It will help you lose 3 to 5 pounds a week — yet EAT PLENTY and gain better health and vitality at the same time.

DR. PHILLIPS' KELPIDINE REDUCING PLAN is the LAZY WAY to get rid of excess pounds and inches from the abdomen, hips and thighs — and to rid you of those annoying, tiring, tummy pains, without taking harmful reducing drugs, and without starving yourself.

DR. PHILLIPS' KELPIDINE REDUCING PLAN will help you lose your weight NATURALLY and SAFELY.

You won't feel hungry while you slenderize and regain your slender figure, because DR. PHILLIPS' KELPIDINE REDUCING PLAN allows you to eat THREE meals and satisfying snacks each day. You DON'T CUT OUT bread, pie, cream, gravy, etc., you just eat down on them. And you take a half teaspoonful of KELPIDINE just once a day, with your breakfast of fruit juice, egg, meat and coffee. That's all there is to it. No starving necessary. No harmful drugs. Absolutely harmless.

DR. PHILLIPS' KELPIDINE REDUCING PLAN is a tired and restless plan for people who want to lose weight SAFELY... at the rate of 3 to 5 pounds a week. The wonderful and beneficial results will amaze you.

ECONOMY PACKAGE
3 Months' Supply
\$2.00

TRIAL PACKAGE
30-Day Supply
5¢

NO
Necessity
NO
HARMFUL
DRUGS
ABSOLUTELY
HARMLESS

DO NOT DELAY
START TODAY

CUT OFF AND MAIL THIS COUPON NOW

\$2.00

THREE MONTHS
SUPPLY

AMERICAN MEDICAL SUPPLY CO.
1711 Broad Street, Newark, N. J.

Enclosed find \$2.00 for DR. PHILLIPS' KELPIDINE REDUCING PLAN. Please send me three months' supply of this wonderful weight-reducing drug. I have already tried the dieting method and have gained weight. I am now dropping the weight I gained and I will not gain it back.

Name _____
Address _____
City _____

MONEY-BACK GUARANTEE

• HOW TO QUICKLY SAFELY

REDUCE

the lazy way

NO STRAIN • DOCTORS APPROVE

Lose 3 to 5 lbs. a Week

• YOU EAT PLENTY!

Just a pinch of the true substance, Kelp-Dine, follows the KELP-DINE RE-REDUCING Plan. Simply add a half teaspoon of KELP-DINE per meal a day, or two meals. EAT AS YOU USUALLY DO. DON'T CUT OUT food, merely add. You can drive on down. THAT'S ALL THERE IS TO IT. SAFE. REAL. Lose more weight PERSISTENTLY and RAPIDLY. You won't feel hungry, while reducing all pounds and inches.

No more waiting . . . and not getting back your slender lines. Reduce like never before. With Kelp-Dine, you can reduce safely, fast and sure.

Only \$2.00 per box for KELP-DINE-REDUCING. Add a full 30-day supply for \$4.00.

NO EXERCISE
NO HARMFUL DRUGS

100% FULL 30 DAY SUPPLY

AMERICAN HEALTHCARE CO.
871 Grand St., Newark 2, N. J.

Send me 3 boxes of the KELP-DINE-REDUCING Plan and one 30-day supply of KELP-DINE-REDUCING for \$4.00.

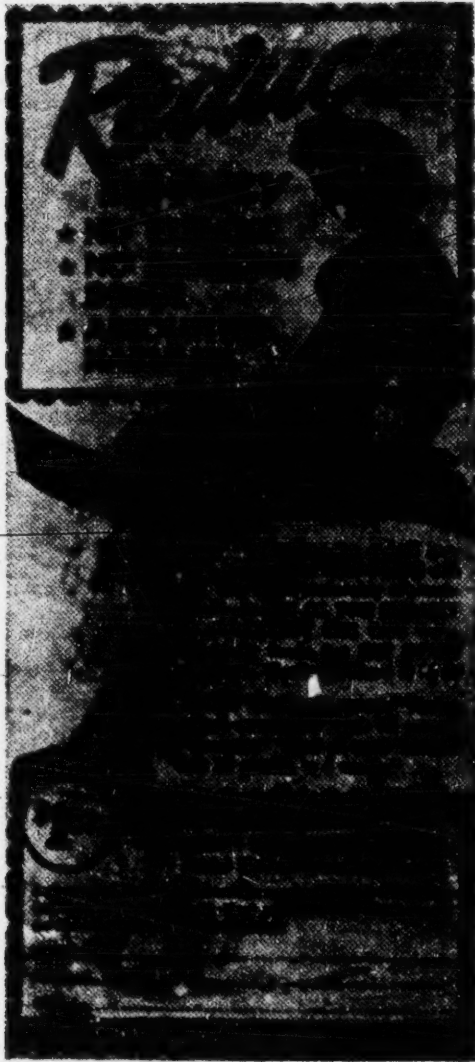
Name _____
Address _____
City _____

☐ I enclose \$4.00 and a business reply postage stamp.

3 boxes of Kelp-Dine-Reducing will reduce your weight:
- Lose 18 pounds in 3 weeks
- Lose 21 pounds in 4 weeks

100% MONEY BACK GUARANTEE

[illegible]



REDUCE SAFELY

EXERCISE
FOODING
GSS
AND ONLY
HAS LESS

LOSE 3 to 5 lbs. a WEEK

Follow the KELPINE REDUCING PLAN
Simply take a half ounce of KELPINE each day. EAT AS YOU USUALLY DO. DON'T CUT OUT fatty, marshy foods. **CUT DOWN** on them. That's all there is to it!

EXERCISE 1-2 "Dietary approved." "Make me feel wonderful." "Lost 15 pounds in 4 weeks." "Lost so much more." "Lost 22 pounds in 4 weeks."

ONE MONTH'S SUPPLY

\$1.00

AMERICAN HEALTHAIDS CO.
871 Grand Street, Newark 2, N. J.

Enclosed find \$1.00 for the KELPINE REDUCING PLAN and one month's supply of KELPINE to be used as one package prepaid. If we wanted I may return unused portion and my \$1.00 will be refunded.

NAME _____
ADDRESS _____
CITY _____
State _____
Zip _____

MONEY BACK GUARANTEE

REDUCE

LOSE 3 to 5 lbs. A WEEK

No Exercise Required • No Restrictive Diets
Absolutely Harmless • YET LOST FLAVITY

1. FOLLOW EASYFIND REDUCING PLAN
Simply take a half teaspoon of EASYFIND with your meals
including afternoon tea. At 100% GUARANTEED 100%
EASYFIND you can study books, eat out
unconcerned that you're losing weight.

2. GET THE EASYFIND
EASYFIND

3. GET THE EASYFIND
EASYFIND

4. GET THE EASYFIND
EASYFIND

5. GET THE EASYFIND
EASYFIND

6. GET THE EASYFIND
EASYFIND

7. GET THE EASYFIND
EASYFIND

8. GET THE EASYFIND
EASYFIND

9. GET THE EASYFIND
EASYFIND

10. GET THE EASYFIND
EASYFIND

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Stedman's Medical Dictionary

By T. L. Stedman, 13th ed. Williams & Wilkins,
1936, page 428

Fucus (*S. phykos*, seaweed.) A genus of seaweeds, natural order of *Fucaceae*. *F. crispus*, Irish moss, *chondrus*. * *F. siliquosus*, a species resembling *f. vesiculosus* and sometimes substituted for it. *F. vesiculosus*. *Quercus marina*, bladder-wrack, kelp, a seaweed of the northern Atlantic and Pacific coasts; the dried thallus, official in the N.F. as *fucus*, has been employed in the treatment of obesity and of enlarged glands in doses of gr. 10-15 (0.6-1.0), m 10 (0.6) of the N.F. fluidextract.

The American Illustrated Medical Dictionary

by W. A. N. Dorland, 20th ed., Saunders, 1944,
page 588

Fucus (*fu kus*), gen, *fu ci* (L.; *qukos*). A genus of seaweeds. *F. crispus*, *F. hibernicus*, furnishes Irish moss. *F. islandicus*, *cetraria*. *F. vesiculosus*, bladder-wrack, is used in goiter and glandular diseases, and as a cure for obesity. Dose of solid extract, 10 grams (0.666 Gm); of fluidextract, 60-120 minims (4-8 cc.).

The Dispensatory of the United States of America

by H. C. Wood, Jr., & A. Osol, Ed. 23, Lippincott, 1943,
page 1371

Fucus. Bladderwrack. Seawrack. Kelp-ware. Black-tang. Cutweed. *Quercus Mariana*—"Fucus is the dried thallus of *Fucus vesiculosus* Linne, *Fucus serratus* Linne, *Fucus nodosus* Linne or *Fucus siliquosus* Linne (Fam. *Fucaceae*)."
N.F.V.

The *Fucus nodosus* L. and the *F. siliquosus* L. have been assigned to different genera and are now more properly known as *Ascophyllum nodosum* (L.) LeJolis and *Halidrys siliquosa* Lyngb.

These are common brown algae of the Rockweed group found growing on rocks in the North Atlantic Ocean or on the banks of inlets and bays thereof, between low and high tide marks. They attach themselves to rocks or mussels by expanded feet. On the coasts of Scotland and France they are used in the preparation of Kelp. They are also employed as a manure, and are mixed with the fodder of cattle.

Under the name of Corsican moss or helminthochorton there was formerly used, as a vermifuge, a mixture of various marine plants.

Bladder-wrack contains a gelatinous substance known as algin (alginic acid), about 0.1 per cent of a volatile oil, a small quantity of combined iodine, mannitol and a small amount of a peculiar sugar called fucose.

The N.F. described it as follows: "Sometimes a meter in length, but usually in shorter pieces, dichotomously branched, brownish black or slightly reddish, usually with a slight, whitish incrustation; flat, smooth, from 0.5 to 4 cm. in width, margin entire or serrate, with or without a stout midrib throughout, along which are irregularly disposed oval or oblong air-vesicles of varying length of which may be absent; apex of callus occasionally swollen, ovate or elliptical, about 5 mm. in diameter and bearing numerous conceptacles. Odor strongly seaweed-like; taste saline and nauseous." N.F.V. For microscopic characters of fuc see U.S.D., 22nd ed., p. 1386.

The charcoal derived from kelp was at one time used, under the name of *Athiops vegetabilis* or vegetable ethiops, in the treatment of goiter and scrofulous swellings. Bladderwrack is an ingredient in certain nostrums used in the treatment of morbid obesity. A. T. Carson affirms, however, that the *Fucus vesiculosus* is largely used in Ireland for fattening pigs, and it is doubtful whether its preparations are capable of reducing human obesity unless given in such doses as to interfere with digestion and injure the health. A possible explanation of the action of bladderwrack in obesity, if it exercise any, is found in the experiments of Hunt and Seidell (*J. P. Ex. T.*, 1910, 2, 15), who present evidence indicating that the extract of this plant is a powerful stimulant to the thyroid gland.

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The Merck Index
5th ed., Merck & Co., 1940
pages 246-247

Fucus, N. F. V.

Bladder-wrack, Sea-wrack, Bladder *Fucus*, Kelp-ware, Black-tang, Cut-Weed, Sea-oak. Dried thallus of *Fucus vesiculosus* L., *F. serratus* L., or *F. siliculosus* L., Furaceae, Habit. Atlantic and Pacific Oceans, Constit. Algin, about 0.01% iodine and some bromine, mannite.

Use: Intern. Formerly used in goiter, obesity, scrofula on account of iodine content. Dose: 2-8 Gm. (30-120 grn) in decoction. Fl'extr. 2-8 cc (30-120 M).

- 47 *Pharmacotherapeutics, Materia Medica & Drug Action*
by S. Solis-Cohen and T. S. Githens, Appleton, 1928,
page 1173

Fucus Vesiculosus (Bladderwrack) contains a considerable proportion of readily assimilable iodine and was at one time given raw or in the form of charcoal in the treatment of goiter and as an antifat remedy. This and several other species of *Fucus* and of *Laminaria*, given in finely chopped particles, are sometimes used, like agar, to relieve costiveness by increasing the bulk of the intestinal contents.

Glycerinum—The external use of glycerin are discussed in the section on Emollients, with its pharmacodynamic action.

- 48 *Gould's Medical Dictionary*

Edited by R. J. E. Scott, 3rd ed., Blakiston, 1931,
page 533

Fucus (fu'-kus) (fukos, seaweed). A genus of marine algae, the rockweeds. *F. vesiculosus*, bladder-wrack, sea-wrack, is used in goiter, glandular enlargements, and in *obesity*, under the names of antifat. Dose of the solid extract 10 gr. (0.65 Gm); of fluid-extract 1-2 dr. (4-8 Cc).

- 49 *The National Formulary*

5th ed., American Pharmaceutical Assn., 1926,
pages 85, 333-334

(page 85)

Fluidextractum Fuci
Fluidextract of *Fucus*
Fidext *Fuci*

Fucus, in moderately coarse power . . . 1000 Gm.

Prepare a Fluidextract by Type Process A (page 69), using a mixture of three volumes of alcohol and one volume of water as the menstruum.

Average Dose: Metric, 0.6 cc.—Apothecaries, 10 minims.

(page 333)

Fucus
Fucus
Bladderwrack

Fucus is the dried thallus of *Fucus vesiculosus* Linne', *Fucus serratus* Linne', *Fucus Nodosus* Linne', or *Fucus siliculosus* Linne' (Fam. *Fucaceae*). *Fucus* contains not more than 3 per cent of foreign organic matter and yields not more than 4 per cent of acid-insoluble ash.

Description and physical properties.

Unground Fucus: Sometimes a meter in length, but usually in shorter pieces, dichotomously branched, brownish black, or slightly reddish, usually with a slight, whitish incrustation; flat, smooth from 0.5 to 4 cm. in width, margin entire or serrate with or without a stout midrib throughout, along which are irregularly disposed oval or oblong air-vesicles of varying lengths, or which may be absent; apex of thallus occasionally swollen, ovate or elliptical, about 5 mm. in diameter and bearing numerous conceptacles. Odor strongly seaweed-like; taste saline and nauseous.

(page 334)

structure; Epidermal cells polygonal in surface view, with colorless walls; hypodermis of about 4 rows of longitudinally elongated mucilaginous cells; remaining tissue consisting of pseudo-parenchyma loosely arranged, much elongated and with large intercellular spaces; sections bearing conceptacles of thallus show spherical cavities up to about 0.625 mm. in diameter, containing either antheridiphores bearing pyriform antheridia from 0.030 to 0.043 mm. in length and sterile cells, or rounded oogonia up to 0.080 mm. in diameter separated by paraphyses.

50 **Powdered Fucus:** Reddish brown; numerous fragments of epidermal tissue with polygonal cells from 0.012 to 0.025 mm. in length; elongated cells of hypodermis from 0.045 to 0.080 mm. in length, inner tissue in irregular fragments composed of pseudo-parenchyma with thick mucilaginous walls.

Preparation: Fluidextractum Fuci.

Average Dose: Metric, 0.6 Gm.—Apothecaries, 10 grains.

51 *Journal of Pharmacology and Experimental Therapeutics*
2:15, 1910

The thyroid gland, has, as is well known, a special affinity for iodine. Not only does it take up and retain iodine from the minute amounts present in drinking water and ordinary foods, but it takes up and retains some of that administered in the form of potassium iodide and iodoform; its physiological activity may be greatly and rapidly increased in this manner. The question whether certain iodine compounds have a special affinity for the thyroid, whether, in other words, there are thyreotropic iodine compounds, as Loeb, for example, showed there are lipotropic iodine compounds, does not seem to have been investigated; Kocher stated several years ago that such a compound is a great desideratum in the treatment of goitre.

We believe we have found in bladderwrack an iodine compound which may properly be called thyreotropic, that is, a compound which, as we interpret our results, increases the activity of the

thyroid in doses far smaller than do any other iodine compounds with which we have experimented.

We have approached the subject from the physiological rather than from the chemical or analytical standpoint; that is, we have endeavored to test the effects of various compounds upon the activity of the thyroid instead of determining how much iodine is actually absorbed by the gland. The latter method is open to . . .

The considerations which led to our experiments were summarized by one of us in an earlier paper as follows:

a. The Effects of Certain Iodine Compounds are in Part the Same as Those of Thyroid. Experiments with Acetonitrile. Many experiments showed that potassium iodide and some other iodine compounds (bladderwrack, iodoform, iodole, etc.) when fed to mice increase their resistance to acetonitrile; thyroid has a similar but far greater effect. This fact would not have much significance were it not that rats and guinea-pigs (if the thyroid gland is intact) react towards these iodine compounds in exactly the opposite way, but still just as they do towards thyroid; in other words, the resistance of rats and guinea-pigs towards acetonitrile is lowered, or at least never increased, by deeding thyroid and certain iodine compounds.

In some experiments the administration of iodine compounds had either a very slight or no effect. It is probable that this absence of effect was due to the condition of the thyroid. The point which I desire to emphasize here, however, is that whenever potassium iodide or other iodine compound does have an effect on the resistance of animals to acetonitrile (and this is usually the case) it invariably affects mice and guinea-pigs in exactly opposite directions.

52 b. Experiments with Morphine. The feeding of thyroid lowers the resistance of mice, rats and guinea-pigs to morphine; the feeding of potassium iodide and bladderwrack has a similar though less marked effect; here again the iodine compounds affected the resistance of animals to this poison the same way that thyroid did.

It was further shown that the effect of several iodine compounds upon the resistance of guinea-pigs to acetonitrile was either greatly diminished or entirely abolished if the thyroids had been removed; the following conclusions were drawn:

The iodine compounds convert the available iodine-poor thyroglobulin into an iodine-rich compound, with the result that the animal is in a condition of hyperthyroidism; it was shown above that when such a condition of hyperthyroidism is produced by the feeding of thyroid the animals show the same increased susceptibility to acetonitrile.

It is impossible to increase the susceptibility by the administration of iodine compounds beyond a certain point, and this is less than that which may be produced by thyroid feeding; this difference probably depends on the fact that the thyroid has at any time but a limited supply of iodine-poor thyroglobulin; when this is iodized to its maximum there can be no further increase in susceptibility. Of course, it is possible that another factor is involved; that the effect of the iodine is simply to cause an increased secretion of the active principle already present, but on the whole the former suggestion seems more probable.

The plan of the following experiments was to determine the smallest amounts of various iodine compounds which when fed to animals, caused distinct changes in their resistance to acetonitrile, and also to determine the maximum effect which could be obtained. If the hypothesis that certain compounds are thyreotropic is correct, we should find that these cause a change in the resistance in much smaller doses in terms of their iodine content than the other compounds. If, further, iodine compounds affect the resistance of animals to acetonitrile only through the thyroid gland, then we should not expect to find that the maximum effect of one compound would differ markedly from that of others. As will be shown the experiments are in accord with the hypothesis in both respects.

It was thought, that, in addition to the light such experiments would throw on the existence of thyreotropic iodine compounds, they would be of interest in other connections. Thus so far no other iodine compound has been found which has the effects upon metabolism, cretinism or myxoedema that thyroid has; as will be shown, we also, making use of this new and extremely delicate test for thyroid, have found no other iodine compound having the effects of thyroid. . . .

Summary. Bladderwrack containing 0.011 mgm. iodine had a slight effect in protecting mice against acetonitrile.

53 Summary. Bladderwrack, bladderwrack and sajodin, and sajodin, increased the resistance by one-half or more. Iodalia had a slight effect. Bladderwrack with 0.03 mgm. iodine was as effective as that with 0.09 mgm.; the effect was but slightly increased when a relatively large amount of sajodin was added. Thyroid containing 0.0018 mgm. iodine was at least 3 times as effective as bladderwrack containing 0.03 mgm. iodine; hence the thyroid was at least 50 times as active as bladderwrack. The activity of the thyroid may be similarly estimated as at least 5000 times as great as that of sajodin and the activity of bladderwrack as about 90 times as great as that of sajodin (all expressed in terms of iodine).

Summary: The bladderwrack protected against nearly $11\frac{1}{2}$ times the fatal dose.

Summary. Extract of bladderwrack with 0.0084 mgm. iodine protected against $11\frac{1}{2}$ times the fatal dose; iodalbum with 1.05 mgm. iodine (or 125 times as much) had no distinct effect. Hence we may estimate that the iodine of bladderwrack is about 180 times as active as that of iodalbum.

54. *Dublin Journal of the Medical Sciences* 60: 493, 1875

view of the case the prognosis could not be very favorable, but two indications appeared to suggest themselves as the only means of arresting a fatal issue—to lessen, if possible, the present accumulation of fat, and to restore the muscular activity. When this boy was in hospital, in February, 1874, I began to give him the liquid extract of the fucus vesiculosus, as recommended in cases of obesity by M. Duchesne-Dupare in 1862. On that occasion he took it in drachm doses, given three times a day in mint water. While in the third week of this treatment he made his escape from the house, before sufficient time had elapsed for him to have derived any obvious benefit from the medicine. M. Duchesne-Dupare was led to adopt this remedy from observing its effects in obstinate psoriasis, for which its value had been much extolled. The psoriasis did not improve, but it was noticed that the patients who took this medicine became much emaciated, although they suffered neither from indisposition nor disturbed digestion; their flow of urine was from indisposition nor disturbed digestion; their flow of urine was layer formed on its surface. Although the structure and chemical composition of the different kinds of fucus (there are fourteen British species) are almost identical, M. Duchesne-Dupare insists that it is only the fucus vesiculosus which produces the effects mentioned.

Among other remedies Dr. Down used the extract of the fucus vesiculosus in doses of half-a-drachm three times a-day; he found it promote diuresis and a diminution of weight at the rate of four ounces and one-third a week. He considers that the results obtained from the fucus vesiculosus were such as to justify its being regarded as a safe, and to a certain extent effectual plan for diminishing obesity;

55 United States District Court, District of New Jersey

In Equity

JOSEPH J. PINKUS, trading as American Health Aids Company,
also as Energy Food Center, PLAINTIFF,

vs.

FRANK C. WALKER, Postmaster General of the United States, and
LOUIS A. REILLY as Postmaster of the City of Newark in the
County of Essex and State of New Jersey, DEFENDANTS

Order to Show Cause

June 1, 1945

Upon reading and filing the bill of complaint filed herein, and good and sufficient reasons appearing therefor,

It is, on this first day of June, 1945, upon motion of Fast & Fast, attorneys for plaintiff, for whom appeared Louis A. Fast, Esq.,

Ordered, that Frank C. Walker, Postmaster General of the United States, and Louis A. Reilly, as Postmaster of the City of Newark in the County of Essex and State of New Jersey, show cause before this court at the Federal Building, Federal Square, Newark, New Jersey, on the 11th day of June, 1945, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an order should not be made enjoining and restraining the defendants, Frank C. Walker, Postmaster General of the United States, and Louis A. Reilly as Postmaster of the City of Newark in the County of Essex and State of New Jersey, from carrying out the terms of an order made on May 7, 1945 by Frank C. Walker as Postmaster General of the United States, wherein

the plaintiff is restrained from using the mails in connection
56 with his business of selling Dr. Phillip's Kelp-I-Dine Reducing Plan; and it is further

Ordered, that a copy of this order and of the bill of complaint with affidavit annexed thereto, be served upon Louis A. Reilly, Postmaster of the City of Newark, and a copy thereof be mailed to the Postmaster General of the United States by addressing it to the Postmaster General at the Post Office Department, Washington, D. C., within five days from the date hereof.

U. S. D. C. J.

57 United States District Court, District of New Jersey

Civil 5616

JOSEPH J. PINKUS, trading as American Health Aids Company,
also as Energy Food Center, PLAINTIFF,

vs.

FRANK C. WALKER, Postmaster General of the United States, and
LOUIS A. REILLY as Postmaster of the City of Newark in the
County of Essex and State of New Jersey, DEFENDANTS

Motion to Dismiss as to Postmaster

To: Fast and Fast, Esquires, 60 Park Place, Newark 2, New Jersey,

SIRS:

Please take notice that the defendant, Louis A. Reilly, as Postmaster of the city of Newark in the County of Essex and State of New Jersey, by special appearance through his counsel, and with full reservation of all rights, will move this Honorable Court at the United States Court Room, Federal Building, Newark, New Jersey, on June 11, 1945, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to dismiss the suit filed herein as to the said defendant for the reason that this Court is without jurisdiction over Frank C. Walker, as Postmaster General of the United States, a necessary and indispensable party defendant.

58 Wherefore, premises considered, this defendant prays that this suit be dismissed at the plaintiff's costs.

THORN LORD,

*Thorn Lord, United States Attorney, Attorney for defendant,
Louis A. Reilly, as Postmaster of the City of Newark in
the County of Essex and State of New Jersey.*

By: ROGER M. YANCEY,
Assistant U. S. Attorney,

59 United States District Court, District of New Jersey

Civil 5616

JOSEPH J. PINKUS, trading as American Health Aids Company, also
as Energy Food Center, PLAINTIFF,

VS.

FRANK C. WALKER, Postmaster General of the United States, and
LOUIS A. REILLY as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, DEFENDANTS

Motion to Dismiss as to Postmaster General

To Fast & Fast, Esquires, 60 Park Place, Newark 2, New Jersey:

SIRS:

Please take notice that the defendant, Frank C. Walker, as Postmaster General of the United States, by special appearance through his counsel, and with full reservation of all rights, will move this Honorable Court at the United States Court Room, Federal Building, Newark, New Jersey, on June 11, 1945, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to quash the purported service of process and to dismiss the suit filed herein for want of jurisdiction as to said defendant, for the following reasons:

1. Valid service of process of this Court upon said defendant cannot be made beyond its territorial limits nor in another district and State.

2. This Court is without jurisdiction over Frank C. Walker, as Postmaster General, a necessary and indispensable party defendant.

60 Wherefore, premises considered, the defendant, Frank C. Walker, as Postmaster General of the United States, prays that the purported service of process be quashed and that this suit be dismissed at the plaintiff's costs.

THORN LORD,

United States Attorney.

*Attorney for defendant, Frank C. Walker, as Postmaster
General of the United States,*

By: ROGER M. YANCEY,
Assistant United States Attorney.

61 United States District Court, District of New Jersey

In Equity 5616

JOSEPH J. PINKUS, trading as AMERICAN HEALTH AIDS COMPANY,
also as ENERGY FOOD CENTER, PLAINTIFF,

vs.

FRANK C. WALKER, Postmaster General of the United States, and
LOUIS A. REILLY as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, DEFENDANTS

On Motion to Quash Process of Service and to Dismiss Action as to
Frank C. Walker, Postmaster General, and Louis A. Reilly,
Postmaster; and as to restraint or otherwise of Order dated
May 7, 1945

Opinion—July 18, 1945

Appearances:

Fast & Fast, Esqs., by Louis Fast, Esq., Attorneys for Plaintiff.
Thorn Lord, Esq., United States Attorney.
Roger M. Yancey, Esq., Assistant United States Attorney.

MEANEY, District Judge:

This action is brought by the plaintiff against Frank C. Walker, as Postmaster General, and Louis A. Reilly, as Postmaster of the City of Newark, to enjoin them from carrying into effect a fraud order made by the Postmaster General, excluding from the mails matter addressed to plaintiff, trading as American Health Aids Company.

The Postmaster General charged the plaintiff with conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of sections 259 and 732 of title 39, U.S.C.A. and subsequently, after a hearing, issued an order to the Postmaster at Newark, New Jersey, where plaintiff carried on its business, instructing the Postmaster at Newark to return to the senders any mail directed to the plaintiff, with the words, "Fraudulent Mail to this address returned by order of Postmaster General", stamped thereon; and further forbidding him to pay any money orders drawn to the plaintiff's order.

62 A special appearance was made through the United States Attorney to dismiss the suit as to Frank C. Walker, as Postmaster General, for want of jurisdiction, on the ground that valid service of process upon the said defendant could not be made outside the territorial limits of this court; and for the reason that the court is without jurisdiction on the grounds that the Postmaster General is

a necessary and indispensable party: Defendants move to dismiss as well against Louis A. Reilly, as Postmaster of the City of Newark, for the reason that the court is without jurisdiction over Frank C. Walker, a necessary and indispensable party defendant.

Plaintiff, alleging that the order is arbitrary, capricious and unwarranted, filed his complaint in this court against Frank C. Walker, as Postmaster General, and Louis A. Reilly, as Postmaster of the City of Newark, praying that defendants and their agents be permanently enjoined from obeying the order.

Prior to any determination as to the propriety of the fraud order, it is necessary that the court determine *first* whether there was a valid service of process upon the defendant, Frank C. Walker, as Postmaster General, bringing him within the jurisdiction of this court; and, *secondly*, whether the Postmaster General is an indispensable party to this action.

It is an established principle under the general rules of jurisdiction that the jurisdiction of a district court in an in personam action is limited to the district of which the defendant is an inhabitant or in which he can be found and, further, in a civil suit in personam, jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or
63 service of process upon him at a place where the officer serving it has authority to execute a writ of summons. *Robertson v. Railroad Labor Board*, 268 U. S. 619; *Pine Hill Coal Company v. Gusicki*, 261 F. 974.

In the instant case, it nowhere appears that a valid service of summons was made on the Postmaster General within the jurisdiction of this Court and hence no jurisdiction has been obtained. The consensus of cases holds that unless there are special statutory provisions authorizing service on an officer of the government outside the district where the suit is brought, such service may not effectively be made and no jurisdiction over the officer may be obtained. This is true unless the officer voluntarily appears and consents that the court take jurisdiction over him. In *Transcontinental and Western Air vs. Farley*, 71 F. 2 288, it was held that service of process on the Postmaster General in the District of Columbia was not good service against him in a suit in the District Court of the Southern District of New York.

I am satisfied that the defendant, Frank C. Walker, as Postmaster General, was not brought into this Court by any service admitted to be regular and valid, and accordingly the motion for dismissal as to him is *granted*.

The second motion raises a point considerably more difficult to determine. Is the Postmaster General an indispensable party to this action?

The law on this point is not settled and there is much diversity of judicial opinion. *Jarvis v. Shackelton Inhaler Co.*, 136 F. 2d 116. There have been several recent cases on this subject, in several of which an extensive examination of authorities was undertaken. See *Neher v. Harwood*, C.C.A. 9th, 128 F. 2d 846; *Jarvis v. Shackelton*, C.C.A. 6th, *supra*; *Varney v. Warehime*, C.C.A. 64 6, 147 F. 2d 238; *Peoples Loose Leaf Tobacco Warehouse Co., et al. vs. Cline*, 58 F. Supp. 612 D. C. East Dist. Ky. Compare also: *National Conference on Legalizing Lotteries vs. Goldman*, C.C.A. 2d, 85 F. 2d 66; *Wheeler v. Farley*, 7 Fed. Supp. 433.

It will be of no particular moment for this court to undertake a further analysis of the decisions, for as stated in the *Jarvis* case, *supra*:

"The task of harmonizing these decisions is almost, if not altogether, impossible and * * * we are reluctant to undertake it."

Under such circumstances, I am compelled to follow the decisions that in my opinion embody the sounder reasoning and which will be most likely to best conform to the exigencies of the situation.

In *Varney v. Warehime*, *supra*, the court, in holding a superior official not to be a necessary and indispensable party, stated:

"Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the government, and likewise, public officials should not be compelled to neglect their duties to answer charges of usurpation of power in a distant forum."

The court in the *Varney* case further pointed out that the right of intervention is available to a superior official in any suit where the subordinate is made a party defendant. In that case the court declared itself as adhering to the rule that where the plaintiffs in an action are not seeking to prevent subordinates from executing a discretionary order of their superior, but are challenging the power of the superior to make the regulation, it is not necessary to have the superior officer before the court. *State of Colorado v. Toll*, 268 U. S. 228; *Brooks v. Dewar*, 313 U. S. 354; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Jarvis v. Shackelton Inhaler Co.*, *supra*. Compare *Appleby v. Cluss*, 65 D.Ct.N.J. 160 F. 984.

A similar decision is found in the *Jarvis* case, *supra*, where the court said:

"The dismissal of the bill would have been disastrous to appellee and the expense incident to new litigation hundreds of

miles from home would have been equally crushing. * * * It would have been unjust and inequitable to have dismissed the bill for no other or better reason than adherence to a formal, and what we regard as an inapplicable, rule of equity pleading."

It is my conclusion that the Postmaster General is not a necessary and indispensable party. In arriving at this determination, I have not been unmindful of the position in which the defendant may find himself. I do not conceive, however, that the fears expressed in *National Conference on Legalizing Lotteries v. Goldman, supra*, are of sufficient moment to compel a different result.

Accordingly, the motion as to Louis A. Reilly is *denied*.

The power of this court sitting in equity to review the order is limited to a determination of whether from the evidence adduced at the hearing there is substantial evidence of actual fraud in fact, and not the result of opinion, to support the fraud order.

If there is not such evidence, plaintiff has suffered irreparable injury by the mistaken act of the Postmaster General in issuing the order and is entitled to the injunction he seeks. *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94; *Jarvis vs. Shackelton Inhaler, supra*.

The plaintiff, trading as American Health Aids Company, is engaged in the business of distributing through the mails and in his store a formula known as Dr. Phillip's Kelpidine Reducing Plan, which has for its purpose reducing of excess fat. Plaintiff 66 advertised in many periodicals to the effect that adherence to the reducing plan will reduce fat without discomfort, exercise or restriction to any special dietary regimen, except as set forth in the plan.

The Solicitor, in his "Memorandum for the Postmaster General embodying a finding of fact and recommending the issuance of a fraud order", has set forth in full, examples of plaintiff's advertising in various newspapers and magazines, as well as scripts taken from radio advertising.

The advertisements appearing in print contain a picture of a shapely young woman standing beside scales. Each advertisement contains a blank order form in which there is set forth an offer to refund any monies paid, to any dissatisfied user, under what is called a "Money Back Guarantee". The advertisements in substance suggest that a user of Kelpidine will lose from three to five pounds a week, without exercise, the use of drugs or adherence to a strict reducing diet. The suggestion is that if the user merely cuts down on fatty and starch foods, and takes a half teaspoon of Kelpidine with any meal, the desired results will be obtained. There are also excerpts from letters of satisfied users, describing the satis-

factory results obtained. In essence, all of the advertising contains the same material.

Additional evidence was adduced from two medical witnesses for the government, as well as one for the defense. The testimony of these experts was to the effect that such reduction of weight as might be accomplished would result from the diet or plan which it was suggested be followed, rather than from the beneficial qualities of the kelp. The expert testimony on the value of kelp as a reducing agent was in some dispute. It was not disputed that a reduction in weight of obese persons might be accomplished under the plan prescribed, though the amount would vary and the possibility of ill effects upon certain persons was present.

67 Also offered in evidence were testimonials from persons who had used the kelpidine diet, none of which were shown to be untrue, and all of which indicated satisfactory results by those users.

There was no indication that any of the advertisements held out the suggestion that the reducing plan would effect miraculous results for all corpulent persons, or that all would be similarly benefited. The advertisements in every case contained a money back guarantee which of itself indicated that this was not a universal remedy for all rotund figures. It is noted that the plaintiff did not undertake the marketing of his product without prior consultation and approval of medical authorities of good repute.

A careful examination of the Solicitor's memorandum and of all the evidence adduced at the hearing leads me to the conclusion that there was insufficient evidence from which the Postmaster General could find actual fraud in fact on the part of the plaintiff. The evidence showed a divergence of opinion as to the effectiveness of the Kelpidine reducing plan and of the inherent values of kelp as employed therein. Such a showing is insufficient.

In *School of Magnetic Healing v. McAnnulty*, supra, at page 105, the Court stated:

"As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud."

And further, at page 106, that court said:

"* * * these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis."

68 If as a matter of fact, the course suggested by the complainant in his advertising is deleterious to health, it would appear that the remedy lies in other fields than those governed by postal regulations. Too frequently attempts are made to accomplish by indirection that which should be effected straightforwardly and directly. Surely the powers of government to protect the health and well being of its citizens can better be met by supervising agencies within the actual scope of medical control and by export regulation, than by more or less arbitrary prohibition by the Post Office Department.

It is my conclusion that the fraud order was void. Accordingly, an order may be entered permanently enjoining the defendant, Louis A. Reilly, Postmaster of the City of Newark, from carrying into effect the fraud order heretofore issued by the Postmaster General.

69 United States District Court, District of New Jersey

In Equity 5616

JOSEPH J. PINKUS, trading as American Health Aids Company,
also as Energy Food Center, PLAINTIFF,

vs.

FRANK C. WALKER, Postmaster General of the United States, and
LOUIS A. REILLY as Postmaster of the City of Newark in the
County of Essex and State of New Jersey, DEFENDANTS

Order Dismissing as to Postmaster General

It appearing that an order was made on the 1st day of June, 1945, requiring Frank C. Walker, Postmaster General of the United States, and Louis A. Reilly as Postmaster of the City of Newark in the County of Essex and State of New Jersey, to show cause before this court why an order should not be made enjoining and restraining the defendants, Frank C. Walker, Postmaster General of the United States, and Louis A. Reilly as Postmaster of the City of Newark in the County of Essex and State of New Jersey, from carrying out the terms of an order made on May 7, 1943, by Frank C. Walker as Postmaster General of the United States, wherein the plaintiff, Joseph J. Pinkus, trading as American Health Aids Company and as Energy Food Center, was restrained from receiving the moneys due on postal money orders drawn to the order of American Health Aids Company, or Energy Food Center, and in which order it was provided that Louis A. Reilly as Postmaster of the City of Newark, was directed to inform the

remitter of any such postal money orders that payment thereof had been forbidden and by which order Louis A. Reilly as Postmaster of the City of Newark was instructed to return all letters, whether registered or not, and other mail matter which shall arrive at his office, directed to the said concerns and parties, to the Postmasters at the offices to which they were originally mailed to be delivered to the senders thereof with the words, "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters of matter and where there was nothing to indicate who are the senders of letters not registered or other matter, the said Postmaster of Newark, New Jersey, was directed to send such letters and matters to the appropriate dead letter branch with the words, "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon to be disposed of as other dead matter under the laws and regulations applicable thereto,

And it appearing that upon the return date of the aforementioned order to show cause the plaintiff was represented by Fast & Fast, for whom appeared Louis A. Fast, and Frank C. Walker, the Postmaster General of the United States appeared specially by Thorn Lord, United States Attorney, for whom appeared Roger M. Yancey, assistant United States Attorney, who contended that the said Frank C. Walker, Postmaster General of the United States, was an indispensable party to the action and that since he was not in court and made no general appearance, that the proceedings be dismissed as against him and the said Roger M. Yancey, assistant United States Attorney, appeared for Louis A. Reilly, Postmaster of the City of Newark in the County of Essex and State of New Jersey, and the said United States Attorney moving for a dismissal of the proceedings that inasmuch as the Postmaster General is an indispensable party and was not served that the proceedings be dismissed as against Louis A. Reilly, Postmaster of the City of Newark, County of Essex and State of New Jersey, and the Court having considered the affidavits filed for the granting of the order and hearing argument of counsel and considering the briefs filed by counsel for all the parties concerned,

It is, on this 23rd day of July, 1945, Ordered, Adjudged and Decreed,

(1) That the proceedings be and they hereby are dismissed as against Frank C. Walker, Postmaster General of the United States on the grounds that he was not properly served;

(2) That application to dismiss as against Louis A. Reilly, Postmaster of the City of Newark in the County of Essex and State of New Jersey, be and the same is hereby, denied;

(3) That Frank C. Walker, Postmaster General of the United States is not an indispensable party to this suit;

(4) Louis A. Reilly as Postmaster of the City of Newark in the County of Essex and State of New Jersey, his agents and servants be, and each of them is hereby, until the further order of this Court restrained and enjoined from carrying out the terms of the order made on May 7, 1945 by Frank C. Walker as Postmaster General of the United States, which order is referred to by the Postmaster General as order No. 27936;

(5) That Louis A. Reilly as Postmaster of the City of Newark in the County of Essex and State of New Jersey, his agents and servants, be and each of them is hereby, until the further order of this Court restrained from interfering with the mailing privileges of the said Joseph J. Pinkus, trading as American Health Aids Company and as Energy Food Center and that they and each of them be restrained from interfering with the payment to the
72 plaintiff, Joseph J. Pinkus, trading as American Health Aids Company, also Energy Food Center, of any fund due on postal money orders drawn to the said Joseph J. Pinkus or to the American Health Aids Company or to Energy Food Center, and they are further restrained from informing the remitter of any postal money orders so addressed that the payment thereof had been forbidden and they and each of them are further restrained from returning any letters, whether registered or not, and other mail matter which shall arrive at the office of the Newark Post Office directed to the said Joseph J. Pinkus or the American Health Aids Company, or Energy Food Center, but shall deliver the same to the said Joseph J. Pinkus, individually or trading as American Health Aids Company, or Energy Food Center, in the usual course;

(6) That Louis A. Reilly as Postmaster of the City of Newark, his agents or servants, do until the further order of this Court disregard in its entirety provisions of the order made May 7, 1945 by Frank C. Walker as Postmaster General, which order bears No. 27936, with regard to proceedings instituted by the Postmaster General, case #44210-F, which proceedings were instituted by the Postmaster General to declare that the plaintiff was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of sections 259 and 732 of Title 39, United States Code.

(7) That Louis A. Reilly as Postmaster, do deliver to plaintiff all mail accumulated since July 18, 1945—and held in pursuance to an oral order made by the Court on such date.

THOMAS F. MEANEY,
U. S. D. J.

73 United States District Court, District of New Jersey

JOSEPH J. PINKUS, trading as American Health Aids Company,
also as Energy Food Center, PLAINTIFF,

vs.

LOUIS A. REILLY as Postmaster of the City of Newark in the
County of Essex and State of New Jersey, DEFENDANT

Answer to the Bill of Complaint for Injunction

Filed October 2, 1945

Comes now Louis A. Reilly, postmaster of the United States Post Office at Newark, New Jersey, and for answer to the Bill of Complaint filed herein, says:

1. Defendant admits the allegation contained in Paragraph 1 of the plaintiff's Bill of Complaint that the said plaintiff is engaged in the business of distributing through the mails and in his store located at 871 Broad Street, Newark, New Jersey, a formula known as "Dr. Phillip's Kelp-I-Dine Reducing Plan", but denies that he has knowledge or information sufficient to form a belief as to its purposes.

2. The defendant admits the allegations contained in Paragraph 2 of the plaintiff's Bill of Complaint that he caused advertisements to be inserted in many periodicals. The defendant denies the remainder of the allegations in Paragraph 2 except to admit that the said advertisements asserted that adherence to the reducing plan would reduce fat without discomfort, exercise, or restriction to any special dietary regimen, except as set forth in the reducing plan.

3. The defendant admits the allegations of fact contained in Paragraph 3 of the plaintiff's Bill of Complaint.

74 4. The defendant admits the plaintiff's allegation contained in Paragraph 4 of the plaintiff's Bill of Complaint that in the fraud order issued by the Postmaster General on May 7, 1945, it was found that the plaintiff was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation

of Sections 259 and 732 of Title 39 United States Code. The defendant denies the remainder of the allegations in Paragraph 4 but is informed and believes and, therefore, avers that the memorandum embodying the findings of fact of the Solicitor for the Post Office Department, dated May 3, 1945, recommending the issuance of a fraud order sets forth ample evidence of fraud in law and in fact and defendant respectfully invites attention to the said finding of fact and the fraud order of the Postmaster General based therein which are attached hereto as defendant's Exhibit A.

5. The defendant admits the allegation contained in Paragraph 5 of the plaintiff's Bill of Complaint that at the hearing before the Post Office Department certain exhibits were offered in evidence but the defendant is informed and believes and, therefore, avers that the representations contained in said exhibits were in fact disputed as being false at the hearing and in this connection the defendant respectfully invites attention to the transcript of the testimony taken before the Solicitor for the Post Office Department in this matter on January 10, 11, and 13, and on February 1, 1945, a verified copy of the three volumes taken at that hearing being attached hereto as defendant's Exhibit B.

6. The defendant has no knowledge concerning the truth of the plaintiff's allegations in Paragraph 6 but the defendant avers that whether or not the plaintiff has received testimonials from users of the plan to reduce obesity is immaterial since the value of the plan must be determined upon the basis of competent medical evidence as set out in the finding of fact of the Solicitor for the Post Office Department attached hereto as Exhibit A.

7. The defendant admits the allegations contained in Paragraph 7 of the plaintiff's Bill of Complaint that a hearing involving the charges in this case was heard before an Assistant Solicitor for the Post Office Department and that the charges were prosecuted by an assistant attorney attached to the Office of the Solicitor for the Post Office Department.

8. The defendant admits the allegation contained in Paragraph 8 of plaintiff's Bill of Complaint that exhibit marked Schedule B, attached to the plaintiff's Bill of Complaint, is that of a copy of a diet recommended in the so-called "Dr. Phillip's Kelp-I-Dine Reducing Plan."

9. The defendant has no knowledge concerning the allegations of fact contained in Paragraph 9 of the plaintiff's Bill of Complaint.

10. The defendant admits the allegations contained in Paragraph 10 of the plaintiff's Bill of Complaint but avers that the said allegations do not comprise the full text of the testimony by Dr.

Joseph Thomas Roberts on the questions raised by the fraud order charges and the defendant respectfully invites attention to the transcript of testimony taken at the hearing before the Solicitor of the Post Office Department, attached hereto as defendant's Exhibit B, and especially to pages 76 to 82, inclusive, of Volume 1 of that proceeding. From the testimony contained in this exhibit the defendant avers that the ultimate facts are contrary to those implied from the allegations in Paragraph 10 of the plaintiff's Bill of Complaint.

11. The defendant admits that the allegations contained in Paragraph 11 of the plaintiff's Bill of Complaint include testimony taken before the Solicitor of the Post Office Department but the defendant is informed and believes and, therefore, avers that the allegations contained in said paragraph do not cover the full text of this testimony and do not reflect the correctness of the testimony taken before the Post Office Department at the fraud order hearing and defendant respectfully invites attention to the defendant's Exhibit B hereto attached and especially Pages 80 to 126, inclusive, of Volume 1 of the said testimony.

12. The defendant has no knowledge concerning the truth of the allegations of fact contained in Paragraph 12 of the plaintiff's Bill of Complaint but defendant avers that the allegations contained therein are immaterial to the issues involved herein.

13. The defendant has no knowledge concerning the truth of the allegations of fact contained in Paragraph 13 of the plaintiff's Bill of Complaint but defendant avers that the allegations contained therein are immaterial to the issues involved herein.

14. The defendant has no knowledge concerning the truth of the allegations of fact contained in Paragraph 14 of the plaintiff's Bill of Complaint but defendant avers that the allegations contained therein are immaterial to the issues involved herein.

15. The defendant has no knowledge concerning the truth of the allegations of fact contained in Paragraph 15 of the plaintiff's Bill of Complaint but defendant avers that the allegations contained therein are immaterial to the issues involved herein.

16. The defendant admits that the allegations of fact contained in Paragraph 16 of the plaintiff's Bill of Complaint describe testimony given by Dr. Altounian at the fraud order hearing before the Post Office Department but the defendant is informed and believes and, therefore, avers that the allegations contained in Paragraph 16 of the plaintiff's Bill of Complaint do not cover the entire testimony of Dr. Altounian and do not correctly convey the fundamental facts covered by the testimony of this witness and in

this connection the defendant respectfully invites attention to defendant's Exhibit B hereto attached and particularly to Pages 257 to 334, inclusive, thereof.

17. The defendant has no knowledge concerning the allegations of fact contained in Paragraph 17 of the plaintiff's Bill of Complaint but the defendant is advised by counsel that the statements quoted from various works mentioned are immaterial since they were properly excluded from the hearing before the Post Office Department.

18. The defendant denies the allegations contained in Paragraph 18 of the plaintiff's Bill of Complaint and respectfully invites attention to the finding of fact of the Solicitor of the Post Office Department, a certified copy of which is attached hereto as defendant's Exhibit A.

19. The defendant is advised by counsel that the allegations contained in Paragraph 19 of the plaintiff's Bill of Complaint is a conclusion of law which the defendant need not answer.

20. The defendant denies the allegations contained in Paragraph 20 of the plaintiff's Bill of Complaint and avers that the business in which the plaintiff was engaged does violate the provisions of Sections 259 and 732 of Title 39 United States Code, and defendant respectfully invites attention to defendant's 78-96 Exhibit A hereto attached.

21. The defendant is advised by counsel that the allegations contained in Paragraph 21 of plaintiff's Bill of Complaint are conclusions of law which defendant need not answer.

Further answering the Bill of Complaint the defendant hereby specifically denies each and every allegation of the Bill of Complaint not answered or specifically denied hereinbefore.

Whereas, having fully answered the plaintiff's Bill of Complaint herein the defendant respectfully prays that the plaintiff's Bill of Complaint be dismissed with reasonable costs and that the temporary restraining order, now in effect be vacated.

EDGAR H. ROSSBACH,
United States Attorney;

By: ROGER M. YANCEY,
Assistant United States Attorney,
Attorneys for Defendant, Louis A. Reilly.

97 United States District Court, District of New Jersey

In Equity, Civil No. 5616

JOSEPH J. PINKUS, trading as American Health Aids Company,
also as Energy Food Center, PLAINTIFF,

vs.

LOUIS A. REILLY as Postmaster of the City of Newark in the County
of Essex and State of New Jersey, DEFENDANT

Notice of Motion for Judgment on Pleadings

To: Fast & Fast, Esquires, Attorneys for Plaintiff, 60 Park Place,
Newark 2, New Jersey.

SIRS:

Please take notice that upon the complaint, answer and exhibits filed herein, the undersigned will move this Court at Room No. 357, United States Court and Post Office Building, Federal Square, City of Newark, New Jersey, on the 24th day of June, 1946 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order giving summary judgment to the defendant, pursuant to Rule 56 of the Federal Rules of Civil Procedure, because the pleadings and exhibits show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, or for such other and further relief as the Court may deem just, with costs.

EDGAR H. ROSSP'CH,
United States Attorney,
Attorney for Defendant,
Federal Square,
Newark, New Jersey;

By: ROGER M. YANCEY,
Assistant United States Attorney.

98 United States District Court, District of New Jersey

In Equity, Civil No. 5616

On Motion for Summary Judgment

JOSEPH J. PINKUS, trading as American Health Aids Company,
also as Energy Food Center, PLAINTIFF,

vs.

LOUIS A. REILLY as Postmaster of the City of Newark in the County
of Essex and State of New Jersey, DEFENDANT

Opinion

June 5, 1947

Appearances:

Edgar H. Rossbach, Esq., United States Attorney; Rodger M. Yancey, Esq., Assistant United States Attorney. For the Government.

Fast & Fast, Esqs., Attorneys for Plaintiff.

MEANEY, District Judge.

This matter is before the Court on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, based on the ground that on the pleadings and exhibits filed herein, there is no genuine issue as to any material fact and defendant is entitled to a judgment as a matter of law.

The action arises out of suit brought by the plaintiff, Joseph J. Pinkus, trading as American Health Aids Company and also as Energy Food Center, against Louis A. Reilly, as Postmaster of the City of Newark, to enjoin the carrying out of a "fraud order" made by the Postmaster General excluding from the mails matter addressed to plaintiff. The matter originally came before this court on plaintiff's motion for a preliminary injunction, which was issued following the filing of an earlier opinion by this court. In the original opinion, reported in 61 Fed. Supp. 613, a permanent injunction was ordered, which was later modified in the
99 order issued pursuant to that opinion, to an ad interim restraint pending the further order of this court.

Subsequent to the motion for a preliminary restraint, the defendant filed an answer and now seeks summary judgment for the defendant based on the pleadings and exhibits filed herein.

The Postmaster General in issuing the so called "fraud order", found that the plaintiff was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of sections 259 and 732 of title 39 (39 U. S. C. A. 259, 732). The plain-

tiff is engaged in the business of selling and distributing, through the mails and in his store, a formula known as Dr. Phillip's Kelpidine Reducing Plan, which has for its purpose reducing of excess fat. Advertisements appeared in many periodicals to the effect that adherence to the reducing plan will reduce fat without discomfort, exercise or restriction to any special dietary regimen, except as set forth in the plan.

The solicitor for the Postmaster General in his memorandum made findings of fact, and on such findings recommended the issuance of the fraud order. In the previous opinion filed in this matter, this Court granted the interim restraint, based upon this court's determination that there was insufficient evidence from which the Postmaster General could find actual fraud in fact, as distinguished from a finding based upon difference of opinion.

Further examination of all the pertinent facts as they are contained in the papers before the court, including the solicitor's memorandum and the record of the hearing before the Solicitor,

leads me to the same conclusion as that originally reached.

100 The defendant has urged with great vigor the argument that this Court in reviewing the record is not called upon to make an independent finding as to whether the enterprise in which the plaintiff is engaged is a fraud, but rather to determine whether the Postmaster had any evidence to sustain his fraud order. With this contention the Court is in complete agreement. The scope and extent of judicial review of a "fraud order" issued by the Postmaster General is well defined in *Read Magazine v. Hannegan*, 63 F. Supp. 318, where the Court states that:

"The duty of administering the law devolves on (the Postmaster General). The discretion is vested in him. The determination of the fact whether a fraudulent scheme is being conducted must be made by him 'upon evidence satisfactory to him'. The court may not substitute its own judgment for that of the Postmaster General. Neither may it review the weight of evidence and set aside his action merely because the court might have arrived at a different result on the same evidence."

The power of a court sitting in equity to review the order extends to the limits above noted and not further, but the decision of the Postmaster General may be enjoined on the grounds that it was issued in a case which was not within his jurisdiction. Thus, if the court determines that the fraud order was issued on a finding by the Postmaster General, based on opinion evidence, instead of evidence arising in fact, the order is illegal and without authority. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Jarvis v. Shackelton Inhaler Co.*, 136 F. (2) 116.

In the instant case the memorandum for the Postmaster-General, on the basis of which the fraud order was entered, contained findings of fact "based only upon the medical testimony of the expert witnesses" appearing on behalf of both the government and the plaintiff. The findings as to the effectiveness of the plan, the severity of the diet, and the inherent values of kelp as employed in the kelpidine plan, are not such matters, in the Court's
 101 opinion, as are subject of proof as an ordinary fact. The rigors of the plan and the claim of its effectiveness as a weight reducing method may be hotly contested, but there remains no exact standard of absolute truth by which to prove the assertions false and a fraud.

Such a determination seems to me to place this case peculiarly within the ruling of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, when the court in that case held that:

" * * * these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis."

The Government urges upon the court the argument that the instant case is more nearly analogous to the situation in *Leach v. Carlisle*, 258 U. S. 138. With that contention the court cannot agree. There is no assertion in this case by plaintiff, through advertising or otherwise, that his reducing plan is a cure-all panacea, or that each and every user will experience equally beneficial or satisfactory results. Neither does it appear that the fraud order was issued on the basis of any such finding.

By the determination made herein, this court does not intimate or suggest in any manner, approval or disapproval of the reducing plan advocated by the plaintiff. The court is convinced, however, that the question of whether the methods of treatment for obesity as suggested by the plaintiff's reducing plan, are in fact without beneficial value, or are so far from producing results claimed by the method or treatment advocated as to amount to a fraud on the users thereof, was not the kind of question intended to be submitted for decision to a Postmaster General. The effectiveness of almost any particular method of treatment of disease is to a greater or less extent a fruitful source of difference of opinion.

102 The effectiveness of the treatment under plaintiff's plan, the inherent value of kelp as a reducing agent in connection with the dietary regimen, and the severity of the diet suggested are of this character, and the efficacy of any particular method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. (*American School of Magnetic Healing, supra.*)

If, as this court suggested in its earlier opinion, the course advocated by plaintiff is deleterious to health, it would appear that the remedy lies in other fields than those governed by postal regulations.

In view of the foregoing, the defendant's motion for summary judgment is denied. The court is satisfied, however, that on the evidence before it, summary judgment should enter for plaintiff. No cross-motion for such judgment having been filed, entry of summary judgment for plaintiff will be withheld until such motion is made.

103 United States District Court, District of New Jersey

JOSEPH J. PINKUS, trading as AMERICAN HEALTH AIDS COMPANY,
also as ENERGY FOOD CENTER, PLAINTIFF,

VS.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the
County of Essex, and State of New Jersey, DEFENDANT

Notice of Motion for Summary Judgment

*To Louis A. Reilly, as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, or Edgar H. Rossbach,
Esquire, United States Attorney:*

SIRS:

Please take notice that we shall appear before the Honorable Thomas F. Meaney, District Judge of the United States District Court for the District of New Jersey, at the District Courtrooms, Post Office Building, Federal Square, Newark, New Jersey, on Monday, June 23, 1947, at 10:00 A.M. in the forenoon, or as soon thereafter as counsel can be heard, and apply for an order or decree granting summary judgment in favor of the plaintiff according to the prayers contained in the Bill of Complaint filed herein. We shall base the said motion upon the pleadings and exhibits that were before the Court upon the motion made by the defendant for summary judgment.

FAST & FAST,
Attorneys for the Plaintiff.

104 United States District Court, District of New Jersey

JOSEPH J. PINKUS, trading as AMERICAN HEALTH AIDS COMPANY,
also as ENERGY FOOD CENTER, PLAINTIFF.

vs.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the
County of Essex, and State of New Jersey, DEFENDANT.

Order Granting Motion for Summary Judgment

This matter being opened to the Court by Fast & Fast, attorneys for the plaintiff, upon the return of a motion by defendant for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and a notice of motion on the part of the plaintiff seeking summary judgment in favor of the plaintiff according to the prayers contained in the bill of complaint filed herein, and the Court having considered the said motions, the pleadings herein, the findings of fact by the solicitor for the Postmaster General, the "Fraud Order," the solicitor's memorandum and the record of the hearing before the solicitor, and having heard and considered the arguments of counsel, and the briefs submitted, and the Court being of the opinion that the said "Fraud Order" was not based upon any finding of actual fraud in fact, and that the same was issued on a finding by the Postmaster General, based upon opinion evidence, and that the said order is illegal and without authority,

105 It is, on this 16th day of June, 1947, ordered that the motion on behalf of the defendant be and the same is hereby denied and that the motion on behalf of the plaintiff be and the same is hereby granted;

And it is further ordered that the "Fraud Order" of the Postmaster General be and the same is hereby enjoined;

And it is further ordered that said defendant, Louis A. Reilly, as Postmaster of the City of Newark, in the County of Essex, and State of New Jersey, be and he is hereby enjoined from banning or refusing to accept for mailing Dr. Phillips Kelp-I-Dine Reducing Plan, or the preparation known as Kelp-I-Dine or from in any wise, manner or form from enforcing the order issued on May 7, 1945, by Frank C. Walker, as Postmaster General, more particularly set forth in the bill of complaint filed herein insofar as the plaintiff is concerned, and the said defendant is further ordered to pay any and all Postal Money Orders drawn to the order of the said plaintiff.

And it is further ordered that the said defendant, Louis A. Reilly, as said Postmaster, receive and deliver all letters, either registered

or not, and all other mail matter which shall be delivered or received at the Newark Post Office, in the usual manner as the same existed prior to the issuance of the said "Fraud Order."

THOMAS F. MEANEY,
Judge.

106 United States District Court, District of New Jersey

JOSEPH J. PINKUS, trading as AMERICAN HEALTH AIDS COMPANY,
also known as ENERGY FOOD CENTER, PLAINTIFF,

vs.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, DEFENDANT

Notice of Appeal

*To Fast & Fast, Esquires, Attorneys for the Plaintiff, 24 Commerce
Street, Newark 2, New Jersey:*

SIRS:

Notice is hereby given that Louis A. Reilly, as Postmaster of the City of Newark, in the County of Essex and State of New Jersey, defendant above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the final order entered in this action on June 24, 1947, granting summary judgment in favor of the plaintiff and permanently enjoining and restraining the defendant from enforcing the terms of a "fraud order" made on May 7, 1945, by the Postmaster General of the United States.

EDGAR H. ROSSBACH,

United States Attorney,

*Attorney for Louis A. Reilly, as Postmaster for the City
of Newark, in the County of Essex & State of New
Jersey.*

Office and Post Office Address:

Federal Building,

Newark 1, New Jersey.

By: ROGER M. YANCEY,

Assistant United States Attorney.

MATTHEW

107 United States District Court, District of New Jersey

Civil No. 5616

JOSEPH J. PINKUS, trading as AMERICAN HEALTH AIDS COMPANY,
also known as ENERGY FOOD CENTER, PLAINTIFF,

vs.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, DEFENDANT

*Appellant's Designation of Record Pursuant to Rule 75a of the
Federal Rules of Civil Procedure*

*To the Clerk of the United States District Court for the District
of New Jersey:*

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint and Order to Show Cause.
2. Defendant's motion to dismiss complaint.
3. Opinion of Judge Thomas F. Meaney filed July 18, 1945.
4. Order of July 23, 1945, denying defendant's motion to dismiss complaint and granting plaintiff's motion for preliminary injunction.
5. Defendant's answer to complaint.
6. Memorandum of finding of fact and the fraud order of the Postmaster General denominated Exhibit "A" and the transcript of testimony taken before the Postmaster General (three volumes), denominated Exhibit "B", filed June 7, 1946.
7. Defendant's notice of motion for judgment on pleadings.
8. Opinion of Judge Thomas F. Meaney, filed June 4, 1947.
- 108 9. Final order and judgment of June 24, 1947.
10. Notice of Appeal filed September 19, 1947.
11. This designation.

EDGAR H. ROSSBACH,
United States Attorney;
ROGER M. YANCEY,
Assistant United States Attorney.

109 United States District Court, District of New Jersey

Civil No. 5616

JOSEPH J. PINKUS, trading as American Health Aids Company,
also known as Energy Food Center, PLAINTIFF,

vs.

LOUIS A. REILLY as Postmaster of the City of Newark in the County
of Essex and State of New Jersey, DEFENDANT

*Appellee's Designation of Record Pursuant to Rule 75a of the
Federal Rules of Civil Procedure*

To the Clerk of the United States District Court for the District
of New Jersey.

Appellee designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Notice of Motion by plaintiff for Summary Judgment.
2. This designation.

FAST & FAST,
Attorneys for Appellee,
By HERMAN L. FAST.

110 United States District Court, District of New Jersey

Civil Action 5616

JOSEPH J. PINKUS, trading as American Health Aids Company,
also known as Energy Food Center, PLAINTIFF,

vs.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, DEFENDANT

Stipulation as to Record and Order Thereon

It is hereby stipulated by and between Fast and Fast, (by Herman L. Fast), attorneys for the plaintiff, Joseph J. Pinkus, trading as American Health Aids Company, also known as Energy Food Center, and Edgar H. Roszbach, United States Attorney, (by Roger M. Yancey, Assistant United States Attorney), attorney for defendant, Louis A. Reilly, as Postmaster of the City of Newark, in the County of Essex and State of New Jersey, that the copy of the transcript of testimony taken before the Postmaster General (Three Volumes) filed in this cause, on June 7, 1946, denominated Exhibit "B" and included in the designation of the appellant filed

September 29, 1947, be transmitted to the Circuit Court of Appeals by the Clerk of the United States District Court in lieu of
 111 furnishing copies of the same for preparation of the record on appeal.

FAST & FAST,

Attorneys for Plaintiff;

By: HERMAN L. FAST,

A Member of the Firm;

EDGAR H. ROSSBACH,

United States Attorney,

Attorney for Defendant;

By: ROGER M. YANCEY,

Assistant United States Attorney.

Dated: October 6th, 1947.

It is so ordered:

THOMAS F. MEANEY,

United States District Judge.

112 United States Circuit Court of Appeals, for the Third Circuit
 No. 9518, October Term, 1947

JOSEPH J. PINKUS, trading as American Health Aids Co., also
 known as Energy Food Center, PLAINTIFF-APPELLEE,

vs.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the
 County of Essex and State of New Jersey, DEFENDANT-APPELLANT

Order Assigning Judge

May 3, 1948

Appeal from the District Court of the United States for the
 District of New Jersey.

And now, to-wit: this 3rd day of May A.D. 1948, it is ordered
 that Hon. Richard S. Rodney District Judge, for the District of
 Delaware, be, and he is hereby assigned to sit in above case in order
 to make a full court.

/ [File endorsement omitted.]

113 United States Court of Appeals for the Third Circuit

No. 9518

JOSEPH J. PINKUS, trading as AMERICAN HEALTH AIDS COMPANY,
also as ENERGY FOOD CENTER,

v.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the
County of Essex and State of New Jersey, APPELLANT

Appeal from the Judgment of the District Court of the United
States for the District of New Jersey

Argued May 3, 1948

Before McLaughlin and O'Connell, Circuit Judges, and Rodney,
District Judge

Opinion of the Court—Filed October 25, 1948

RODNEY, District Judge:

This matter arises upon an appeal by Louis A. Reilly, United States Postmaster of the City of Newark, New Jersey, from a summary judgment in favor of the appellee, Joseph J. Pinkus, trading as American Health Aids Company and also as Energy Food Center.

Pinkus, on June 1, 1945, instituted suit in the court below against Reilly to enjoin the carrying out of a "fraud order" issued by the Postmaster General to Reilly forbidding the latter to deliver mail to or cash money orders drawn in favor of Pinkus or certain of his trade name companies, and the officers and agents thereof as such.

114 The "fraud order" was issued by the Postmaster General after an investigation of the appellee's business and upon the recommendation of the Solicitor of the Post Office Department who conducted a hearing in which both the Government and Pinkus participated. The Solicitor found from the hearing, as appears in his memorandum to the Postmaster General, that Pinkus was engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of the laws of the United States.¹ It was upon this ground that the Postmaster General issued his "fraud order" to Reilly on May 7, 1945.

¹ R. S. 3929 and 4041, 39 U. S. C. A. Secs. 259 and 732.

On June 24, 1947 the court below denied a motion for summary judgment by Reilly and entered judgment for permanent injunction in favor of Pinkus upon his motion for summary judgment.² The court below had before it the complaint and answer and the exhibits thereto, which include a transcript of the hearings before the Solicitor, the Solicitor's memorandum to the Postmaster General, the Postmaster General's "fraud order" to Reilly, copies of the allegedly false advertisements, a copy of a suggested diet, and excerpts from certain medical books. See *Pinkus v. Reilly*, D. C. N. J., 71 F. Supp. 993.

The Court below properly based its decision upon the administrative record alone. See *Jarvis v. Shackelton Inhaler Co.*, 6 Cir., 1943, 136 F. 2d 116, 118, and the question could properly be disposed of upon a motion for summary judgment.³

While one of the grounds for appeal was that the Postmaster General was an indispensable party and the proceeding could not be maintained in his absence, and while there had been a conflict between circuits upon this question,⁴ since this appeal was taken the question has been resolved by the Supreme Court in *Williams v. Fanning*, 1947, 332 U. S. 490, where it is held that the Postmaster General is not an indispensable party. Counsel concede that no further discussion of this point is necessary.

Another point briefed by the plaintiff-appellee on appeal is that the two statutes involved violate various provisions of the Federal Constitution. Subsequent to the filing of the brief, however, this point has also been disposed of by the Supreme Court in *Donaldson v. Read Magazine, Inc.*, 1948, 333 U. S. 178, 189-192, wherein the constitutionality of the two statutes is upheld. We therefore deem it unnecessary to consider this phase of the case, since all of the plaintiff-appellee's arguments are answered by the Supreme Court in the cited case.

The two statutes involved⁵ generally provide that the Postmaster General, upon evidence satisfactory to him that any person is conducting a scheme for obtaining money through the mails by means of false or fraudulent representations, may instruct post-

² Appellant Reilly had been restrained from carrying out the "fraud order" under a temporary injunction issued by the court below on July 23, 1945.

³ *Wawa Dairy Farms, Inc. v. Wickard*, 3 Cir., 1945, 149 F. 2d 860, 864; *Fields v. Hannegan*, App. D. C., 1947, 162 F. 2d 17, 18, cert. den., 332 U. S. 773.

⁴ See cases collected in 158 A. L. R. 1126, 1139-1143.

⁵ R. S. 3929, 39 U. S. C. A. Sec. 259 and R. S. 4041, 39 U. S. C. A. Sec. 732.

masters to stamp any letters, including registered letters, or mail matter directed to any such person as "fraudulent" and to return all such mail matter to the postmaster at the office at which it was originally mailed and may forbid any postmaster from paying to any such person any postal money orders drawn to his order. The "fraud order" issued to Reilly against Pinkus in the instant case contained these instructions.

Subsequent to this appeal by Reilly the "fraud order" has been revoked by the Postmaster General insofar as it applied to the Energy Food Center, and its officers and agents as such. This revocation has the effect of making the "fraud order" applicable only to the American Health Aids Company, and its officers and agents as such, at Newark, New Jersey. Such a modification
116 of a "fraud order" is within the scope of the power and duty of the Postmaster General. *Donaldson v. Read Magazine*, 1948, 333 U. S. 178, 184.

The plaintiff-appellee, Pinkus, trading as American Health Aids Company, has been engaged for a number of years in the business of selling and distributing, through the mails and in his store at Newark, New Jersey, a formula known as "Dr. Phillips' Kelp-I-Dine Reducing Plan." This plan is represented generally as a method of reducing excess fat at the rate of 3 to 5 pounds a week by merely cutting down on fatty and starchy foods and taking one-half teaspoonful of "Kelp-I-Dine" daily with any meal, preferably breakfast. The plan has been advertised in newspapers, circulars and magazines and over radio broadcasting stations.

There was placed in evidence at the hearing before the Solicitor certain advertisements of the plan taken from various issues of newspapers and magazines of national circulation and from circulars which were sent through the mails. Radio scripts used to advertise the plan at one radio station were also before the Solicitor. The gist of these advertisements and scripts is that one can lose from 3 to 5 pounds a week without any exercise or reducing drugs and by simply following the "Kelp-I-Dine Reducing Plan." It is stated that one can eat as usual and not cut out fatty, starchy foods but merely cut down on them. The plan is said to be the safe, lazy way to reduce without starving or strain. Some of the advertisements allege that "doctors approve" of the plan, while others declare that "users say doctors approve."

The radio scripts contain statements that age makes no difference in the success of the plan, nor does any ailment such as diabetes or rheumatism.

It is represented in the advertisements that no stringent diet is necessary and that "Kelp-I-Dine" is a purely vegetable product

117 containing minerals (including essential iodine) which satisfy hidden hunger, the false hunger that makes people overeat and add weight.

Each of the advertisements contains an order blank with an offer of refund, labeled as a money-back guarantee, to any dissatisfied customer and laudatory statements from satisfied customers appear in great number in the advertisements.

The purchaser of the "Kelp-I-Dine" product and plan receives two ounces of "Kelp-I-Dine" and a "suggested menu for one day" titled "Dr. Phillips' Kelpidine Reducing Plan." The label on the container of "Kelp-I-Dine" states that it is a "Pacific Kelp" and a nutritional supplement for increasing daily intake of iodine from ocean vegetation" and that the daily dose of one-half teaspoonful contains .3 milligrams of "food iodine," which amount is "300% of Minimum Human Daily Requirements." The label has the approval of the Food and Drug Administration.

At the hearing before the Solicitor the Government introduced testimony from two expert medical witnesses and the plaintiff-appellee introduced testimony from one such witness. The Solicitor's findings as contained in his memorandum are based solely upon the testimony of these three witnesses for the purpose of determining the therapeutic value of plaintiff-appellee's product and treatment.

The Solicitor concluded that although the advertisements led one to believe that Kelp-I-Dine is valuable in the treatment of obesity, actually it is valueless for such purpose; that any reduction in weight which might occur from following the plan would not come about easily, naturally, or as otherwise represented in the advertisements; and that one who follows the suggested diet would not be able to "eat plenty" nor as he "usually does," as advertised by the appellee.

This case involves the somewhat diverging doctrines set forth in *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, and *Leach v. Carlile*, 258 U. S. 138.

118 The *McAnnulty* case, as we understand it, holds that whenever the efficacy of an advertised treatment or method is a matter upon which opinions may honestly differ and which cannot be factually and definitely established, then the Postmaster General has no power under the two statutes here involved to issue a "fraud order" even though he and a great majority of intelligent people may be of the honest opinion that the treatment or method is inefficacious. In *Rood v. Goodman*, 5 Cir., 1936, 83 F. 2d 28, 31, it was declared to be beyond the power of a government official under the two statutes involved to prevent the dissemination of a product or plan merely because he has no belief, *qua* belief in such a plan.

In the McAnnulty case the conclusion was based upon questions raised by demurrer. The court carefully preserved the right of showing factual violations of the law at a later stage.

The case of *Leach v. Carlile*, *supra*, did not concern at all the question of whether the product had some value or was entirely worthless, but solely whether the appellant there was advertising his product as such a panacea or cure-all article as to perpetrate a fraud upon the public. The court, in discussing the McAnnulty decision, said "Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that the question really decided by the lower courts was not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising through the mails to be, that by so advertising it he was perpetrating a fraud upon the public . . ."

It was the McAnnulty doctrine that the court below relied upon in granting the motion by Pinkus for a summary judgment enjoining Reilly from carrying out the "fraud order." The court below held that the effectiveness of the plan, the severity of 119 the diet, and the inherent values of kelp as employed in the "Kelp-I-Dine" plan are not such matters as are subject of proof as an ordinary fact and there is therefore no exact standard of absolute truth by which to prove the assertions in the advertisements false and a fraud.

The Government urges upon this court, and urged upon the court below, that the doctrine of *Leach v. Carlile* should govern. The court below rejected this contention upon the ground that there had been no assertion by the plaintiff-appellee, through advertising or otherwise, that his reducing plan is a cure-all panacea, or that each and every user will experience equally beneficial or satisfactory results, and that the fraud order did not appear to have been issued on the basis of any such finding. It is the latter reason, we think, which makes *Leach v. Carlile* inapplicable. The record is entirely barren of any charge by the Government that the "Kelp-I-Dine" advertisements raised hopes of a cure-all panacea. There is no indication in the record at all that the Government intended to make any such charge and there is no substantial evidence to support such a finding. The basis for the "fraud order" was that kelp is valueless for the treatment of obesity while the advertisements lead one to believe that it is valuable for such purpose. The Postmaster General allegedly found as an ordinary fact that kelp has no value for the specified purpose, but there is nothing to indicate that he found the advertisements asserting cure-all results.

The duty of the court below was to review the evidence before the Postmaster General and the findings based thereon. Where the basis for the issuance of a "fraud order" is that the product or plan is entirely valueless, as a matter of fact, as distinguished from opinion, for the purposes advertised, we think such question is the only matter to be reviewed by the courts. In such case, if the value of a product or plan was not proved factually and if
120 there is an honest difference of opinion as to whether it has some value, then we deem it to be without the province of a reviewing court to determine an entirely different question, viz., whether the product or plan is so far from being the panacea that it is advertised to be that by so advertising it there is perpetrated a fraud upon the public.

The power of the court below to review the action of the Postmaster General in issuing the "fraud order" extends no further than to determine whether there is substantial factual evidence to support the Postmaster General's conclusion that kelp is valueless in the treatment of obesity and whether the findings were fairly arrived at so that it cannot justly be said to be palpably wrong and therefore arbitrary. *Donaldson v. Read Magazine*, 1948, 33 U. S. 178, 186, 189; *Jarvis v. Shackleton Inhaler Co.*, 6 Cir., 1943, 136 F. 2d 116, 119; *Leach v. Carlile*, 1922, 258 U. S. 138, 140.

The court below recognized and agreed with the substantial evidence doctrine, *Pinkus v. Reilly*, D. C. N. J., 71 F. Supp. 993, 994, but found that there was no substantial evidence in fact, and could be none, to support the order, because the matters involved are not subject of proof as an ordinary fact, but rather are matters upon which opinions, as distinguished from facts, may honestly differ. The sole duty of this court on appeal is to determine whether the lower court was correct.

We feel constrained to affirm the judgment of the court below upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General. We would not be understood to say that the value of the plaintiff-appellee's plan and product is not subject to proof as an ordinary fact nor that scientific research and tests may not disclose factually and definitely the efficacy of a particular plan or product. We do say that the evidence upon which the Postmaster General acted was not factual evidence but solely in the nature of opinion evidence. If there be ordinary factual evidence of the

value of the product and plan here involved it was not
121 placed before the Postmaster General. The proceedings in the Post Office Department do not disclose that any scientific test or research was made with the appellee's product or plan or that the opinions of the medical experts were founded upon the results of any such research or tests. On the contrary, the

testimony of the medical experts at the hearing in the Post Office Department seems clearly to have been founded solely upon professional opinion based upon a general reading of authoritative textbooks and discussions with other members of the medical profession and indicates that with respect to the efficacy of appellee's product and plant there are two schools of thought, albeit one may be outmoded and fallacious in the opinion of a majority of the members of the medical profession.

Any conclusion reached by the Postmaster General, therefore, necessarily was based upon evidence in the nature of opinion and could not have been formulated upon ordinary factual evidence. Under these circumstances, we must apply the ruling of *American School of Magnetic Healing v. McAnnulty*, 1902, 187 U. S. 94, and hold that the efficacy of kelp and the "Kelp-I-Dine Plan" is a matter upon which opinions honestly differ and the Postmaster General had no power under the two statutes involved and upon the evidence herein to issue a "fraud order." The discernible difference between this case as now before us and the *McAnnulty* case is this. In the *McAnnulty* case and in this case in the court below it was held that where opinions honestly differ as to the value of a plan or product and such value cannot be factually proven, no fraud order should issue. Our view of the present case is that there appeared a difference of opinion as to value and that no factual proof of the value or lack of value was made or offered. Accordingly, the judgment of the court below is

Affirmed.

122 O'CONNELL, *Circuit Judge*, dissenting.

Since I think there was substantial evidence in fact to support the findings of the Postmaster General, I believe the judgment of the court below cannot be sustained.

In the footnote below, I quote excerpts from advertisements of appellee, which were in evidence at the hearing of the Postmaster General.¹ According to the Solicitor of the Post Office Department,

¹ "Reduce Lose 3 to 5 lbs. a Week. No Exercise Required. No Reducing Drugs, Absolutely Harmless. Yet Eat Plenty. Follow Kelp-I-Dine Reducing Plan . . . Eat as You Usually Do. Don't Cut Out fatty, starchy, foods, just Cut Down on them. . . ."

"How to Quickly, Safely Reduce the lazy way. No Strain, Doctors Approve. Lose 3 to 5 lbs. a week . . . yet Eat Plenty! . . . Lose excess weight Naturally and Safely. You won't feel hungry while you take off pounds and inches."

" . . . The new Kelp-i-dine method is a simple way that requires little effort or trouble. It's a common-sense plan that employs the latest knowledge of nutrition . . . and it's free of harm-

whose findings and recommendation the Postmaster General adopted, the purchaser of appellee's product was led to believe that (a) one could safely reduce his weight three or more pounds per week by following appellee's prescribed treatment and without medical supervision; (b) the principal factor in accomplishing the weight reduction would be a vegetable product containing a minute quantity of iodine, which was alleged by appellee to have hunger-satisfying properties; and (c) that the accompanying diet was of a lenient nature. The Solicitor further found, and the Postmaster General concurred, (a) that patients with chronic diseases could suffer serious results if they took the advertised treatment without medical guidance; (b) that not only did no modern scientific medical textbook or authority recommend the use of kelp as a reducing agent, but also its sole therapeutic effect was as a "nutritional supplement for increasing daily intake of iodine," the deficiency of

123 which element exists only in "certain limited areas of this country"; and (c) that the diet accompanying the product, far from implementing the adjuration to "eat plenty," called for a daily intake of approximately 1000 calories, less than one-half of the average American sustaining diet. From the foregoing, I am not prepared to say that the conclusion of the Postmaster General is patently erroneous, nor that the basis of his conclusion is the type of "opinion evidence" which was rejected in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902).

I think the disposition of this case is dictated by *Leach v. Carlile*, 258 U. S. 138 (1922), as applied in *Donaldson v. Read Magazine*, 333 U. S. 178 (1948). The function of our court, like that of the court below, is not to resolve contradictory inferences, but rather to determine if there was evidence to support the Postmaster General's findings of fraud. 333 U. S. at page 186. Surely appellee's advertisements cannot be said as a matter of law to be conduct which does not fall short of "that fair dealing of which fraud is the antithesis." 333 U. S. at page 188. With full opportunity to do so, appellee nevertheless failed to produce any affirmative testimony tending to prove that kelp is efficacious in the treatment of obesity. Instead, appellee attempted reliance upon testimonials of users of appellee's treatment, which I considered to be hardly

ful drugs, starvation diets, strenuous exercises, salts or physics

. . . Your daily intake of food can be more than adequate . . . you eat plenty . . . You don't cut out starchy foods, you merely cut down on them! That's all there is to it! Kelp-i-dine is a purely vegetable product. It contains the minerals (including essential iodine) that satisfy hidden hunger, the false hunger that makes people overeat and add weight. It helps turn fat into energy . . ."

convincing as a scientific foundation for appellee's representations. *Cf. Research Laboratories v. United States*, 167 F. 2d 410 (C. C. A. 9, 1948). Whether or not it might have been preferable that the *modus operandi* of appellee be tested through some other machinery such as the Federal Trade Commission, I am constrained to conclude that the Postmaster General did not here act arbitrarily or beyond his powers.

Accordingly, I should reverse the judgment of the court below. In view of the holding of the majority of this court, I need not express my opinion whether the scope of cross-examination
 124 permitted appellee at the administrative hearing was so unduly limited as to warrant remand for a rehearing.

125 In the United States Court of Appeals for the Third Circuit, — Term, 194—

No. 9518

JOSEPH J. PINKUS, trading as American Health Aids Company,
 also as Energy Food Center,

vs.

LOUIS A. REILLY, as Postmaster of the City of Newark, in the County of Essex and the State of New Jersey, APPELLANT

Judgment—October 25, 1948

Present: McLaughlin and O'Connell, Circuit Judges, and Rodney,
 District Judge

On appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court,

McLAUGHLIN,
 Circuit Judge.

October 25, 1948.

[File endorsement omitted.]

126 Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

LOUIS A. REILLY, as Postmaster of the City of Newark,
in the County of Essex and State of New Jersey,
PETITIONER,

vs.

JOSEPH J. PINKUS, Trading as American Health Aids
Company, also known as Energy Food Center.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Reporter's Certificate to following transcript omitted in printing.

Before the Solicitor for the Post Office Department
Holding a Fraud Order Hearing

F. & L. Docket 14/303

In the Matter of

AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER;
both at Newark, New Jersey;

AMERICAN INSTITUTE OF FOOD PRODUCTS; WALTER H. EDDY;
WALTER H. EDDY, Ph. D.; WALTER H. EDDY, Ph. D., President;
DR. WALTER H. EDDY, Ph. D.; and ROBERT A. BORIES,
General Manager, all at New York, New York.

Transcript of Proceedings

Wednesday, January 10, 1945,
Washington, D. C.

1 Before the Solicitor for the Post Office
 Department
 Holding a Fraud Order Hearing
 F. & L. Docket 14/303

In the Matter of Charges That

AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER; both at Newark, New Jersey; AMERICAN INSTITUTE OF FOOD PRODUCTS; WALTER H. EDDY; WALTER H. EDDY, Ph. D.; WALTER H. EDDY, Ph. D., President; DR. WALTER H. EDDY, Ph D.; and ROBERT A. BORIES, General Manager, all at New York, New York, are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended).

Washington, D. C.,
 Wednesday, January 10, 1945.

Hearing of the above-entitled matter came on before Honorable Daniel J. Kelly, Assistant Solicitor of the Post Office Department, in the hearing room of the Post Office Department, on Wednesday, January 10, 1945, at 10:20 o'clock a. m.

2

APPEARANCES:

On behalf of the Post Office Department: W. V. RENNIE, Esq., RALPH B. MANHERZ, Esq.

On behalf of the respondent: American Health Aids Company; Energy Food Center, LOUIS A. FAST, Esq.

Colloquy Between Assistant Solicitor and Counsel

MR. FAST. I have been asked by Mr. Louis N. Field who represents the respondents American Institute of Food Products, Walter Eddy in his various capacities, and Mr. Bories, General Manager, of New York, to present an affidavit requesting a postponement for two weeks in so far as he is concerned. In his affidavit, which I shall present to your Honor, he swears that he represents the Universal Asbestos Corporation, the plaintiff in an action pending in the Supreme Court of the State of New York, Queens County, to wit: Universal Asbestos Corporation vs. John A. Smithlin, Inc.; that he has been directed to select a jury

Monday morning, January 8, 1945, and expects to go to trial on that day or the following day; that he believes the trial will last for a period of two or three days. Pending in the same Court and being held for trial subject to his engagement in the foregoing case is the case of Universal Asbestos Corporation vs. Meegan. In addition there is being held for him subject to those two engagements the case of Goldstein vs. Wanderman, in which he represents the defendant, in the Supreme Court of the State of New York, County of Kings, Special Term. And he winds up by saying that for all the foregoing reasons he respectfully requests an adjournment. I should like to file the affidavit.

(The document in question was handed to the Solicitor.)

Assistant SOLICITOR. As I understand, Mr. Fast, you are presenting this on behalf of Mr. Louis Field who represents the respondents whom you have just enumerated.

Mr. FAST. That's right.

Assistant SOLICITOR. What is the position of Government counsel with regard to the affidavit?

Mr. RENNIE. If your Honor please, the respondents Walter H. Eddy; Walter H. Eddy, Ph. D.; Walter H. Eddy, Ph. D., President; Dr. Walter H. Eddy, Ph. D.; and Robert A. Bories, General Manager, all at New York, were notified of this proceeding as of November 23, 1944. We received a letter from Mr. Field dated December 2nd, 1944, in which among other things he requested a reasonable adjournment. We advised him at that time that we would continue the case at his request until December 29th, 1944, December 15th being the original date set down for the hearing. On December 21st, 1944, the Solicitor wrote the following letter to Mr. Louis Field, Attorney at Law, 220 West 42nd Street, New York, New York, (Reading):

4 My dear Sir:

Reference is made to charges of fraudulent use of the mails against the American Institute of Food Products, *et al.*, now pending in this Department.

In this connection I have to state that due to a rearrangement of the calendar of the fraud order hearings, it has become necessary to continue the hearing from December 29, 1944, to 10:00 a. m. January 10, 1945, at the same place previously specified.

Since that date, your Honor, we have heard nothing from Mr. Field prior to the filing of the affidavit this morning and I submit that he has had ample opportunity to appear and

be heard; he has already been granted one adjournment at his request.

Assistant SOLICITOR. Mr. Fast, for the record and for my information do you represent American Health Aids Company?

Mr. FAST. I represent the American Health Aids Company and Energy Food Center.

Assistant SOLICITOR. Just those two?

Mr. FAST. Yes, sir.

Assistant SOLICITOR. Your representation is limited to those two respondents?

Mr. FAST. Yes, sir.

Assistant SOLICITOR. And you make no application for any further adjournment?

Mr. FAST. No, I do not.

Assistant SOLICITOR. You are ready for trial?

Mr. FAST. Except this: I discussed the matter with Mr. O'Brien, one of my witnesses cannot come down here today and Mr. O'Brien said that if I could bring him down on Saturday it would be all right with him. He is the Health Officer of the City of Newark, Dr. Craster, who is one of the gentlemen who wrote a letter in connection with the product.

Assistant SOLICITOR. That is Saturday of this week?

Mr. FAST. Of this week, yes, sir.

Assistant SOLICITOR. That will be the 13th.

Mr. FAST. Yes, sir.

Assistant SOLICITOR. Well, the record now shows that agreement as stated. Is that accurate, Mr. Rennie?

Mr. RENNIE. Yes, the Government has no objection to that.

Assistant SOLICITOR. And that is your agreement with counsel for the respondent?

Mr. RENNIE. Yes, sir.

Assistant SOLICITOR. Well, I deny the application made by Mr. Field because I feel that he has had ample notice of this hearing set for today and has not made any application prior to the hearing for further continuance. He made one application as is shown by the statement of Government counsel and that was granted. Then the Government had to have a further adjournment because of rearrangement of the calendar and he was notified of that and has not made any application until this morning. So I deny the application for further adjournment of the case. Are you ready to proceed, Mr. Rennie?

Mr. RENNIE. Yes sir, I am. I would like to call the witnesses for the Government before we start and let them be sworn.

6 (Inspector C. E. Dunbar, Dr. Fred W. Norris, Mr. E. W. Seward and Mr. Frank W. Casey were sworn as witnesses for the Post Office Department by a Notary Public of the District of Columbia. Also Mr. Joseph John Pinkus was sworn as a witness in behalf of the respondent.)

Mr. RENNIE. If your Honor please, I have a memorandum of the charges in this case before me which I should like to read at this time.

Mr. FAST. May we waive the reading of it?

Assistant SOLICITOR. It is usual to read it Mr. Fast, to get it into the record, or it may be treated as read and the stenographer may copy it in if that's the wishes of both counsels.

Mr. RENNIE. Well, let us treat the memorandum of charges as having been read.

Memorandum of Charges

In the Matter of Charges That AMERICAN HEALTH AIDS COMPANY: ENERGY FOOD CENTER: both at Newark, New Jersey; AMERICAN INSTITUTE OF FOOD PRODUCTS: WALTER H. EDDY: WALTER H. EDDY, Ph. D.; WALTER H. EDDY, Ph. D., President; Dr. WALTER H. EDDY, Ph. D.; and ROBERT A. BORIES, General Manager, all at New York, New York, are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 742 (Sections 3929 and 4041 of the Revised Statutes, as amended).

* * *

It is charged that the above named concerns and persons are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended), which said scheme is in substance and effect as follows:

7 Said concerns and persons are obtaining and attempting to obtain various remittances of money through the mails from divers persons in payment for a product known as "Kelp-I-Dine" and a treatment known as "Dr. Phillip's Kelp-I-Dine Reducing Plan" for the reduction of excess fat, upon pretenses, repre-

sentations, and promises contained in written and printed matter sent through the mails to the effect:

That any person, regardless of age, sex or condition of health, who follows the Kelp-I-Dine Reducing Plan will reduce fat and regain a "shapely figure" easily, quickly, naturally, surely, and without discomfort, exercise, or restriction to any special dietary regimen;

That any person following Dr. Phillip's Kelp-I-Dine Reducing Plan will lose 3 to 5 pounds per week and at the same time "eat plenty" food without the necessity of cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content;

That any person following Kelp-I-Dine Plan as directed will lose weight quickly, easily, safely, and regain a shapely figure without experiencing hunger;

That Kelp-I-Dine contains minerals (including essential iodine) that satisfy hidden hunger, false hunger that makes people overeat and add weight;

That all doctors approve of the use of Kelp-I-Dine Reducing Plan in every case regardless of the age, sex, or condition of the user;

Whereas, in truth and in fact, all of the afoesaid pretenses, representations and promises are false and fraudulent.

I therefore recommend that said concerns and persons be called upon to show cause why a fraud order should not be issued against the names set forth in the caption of this memorandum.

(Signed) WILLIAM C. O'BRIEN,
Attorney.

To the Solicitor
Of the Post Office Department.

Colloquy Between Assistant Solicitor and Counsel

Mr. FAST. May I say that in lieu of an answer I should like to say that had we filed a written pleading it would be in the nature of a denial that we had violated any law and that we have not been responsible for conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, and that we look to the Government for proof of the statements contained in the memorandum.

Assistant SOLICITOR. As I understand it, you are filing no written answer, you merely make an oral plea of general denial of the charges.

Mr. FAST. Yes, sir.

Assistant SOLICITOR. Proceed, Mr. Rennie.

Mr. RENNIE. The postmaster at Newark, New Jersey, was instructed by the Solicitor to serve upon the respondents a copy of the charges just read, and obtained on November 27, 1944, the following copy of a receipt signed by Joseph John Pinkus for American Health Aids. I shall read the receipt dated November 27th.

Mr. FAST. We admit that we received it.

Mr. RENNIE. I would like to get that in the record, sir.

Mr. FAST. All right.

Mr. RENNIE. (Reading):

Received 1 letter from Post Office Department, Office of the Solicitor, Washington 25, D. C. addressed to American Health Aids Company, Energy Food Center, Newark, New Jersey.

(Signed) JOSEPH JOHN PINKUS
American Healthaids Co.

The postmaster at Newark, New Jersey, in transmitting the receipt stated that the American Health Aids received a daily average of 365 letters per day and that the Energy Food Center received a daily average of 1 letter per day.

9 The postmaster at New York City was instructed by the Solicitor of the Post Office Department to deliver a copy of the memorandum of charges just read to American Institute of Food Products; Walter H. Eddy; Walter H. Eddy, Ph. D.; Walter H. Eddy, Ph. D., President; Dr. Walter H. Eddy, Ph. D.; and Robert A. Bories, General Manager. On November 29, 1944, the postmaster secured a receipt from the American Institute of Food Products; Walter H. Eddy; Walter H. Eddy, Ph. D.; Walter H. Eddy, Ph. D., President; Dr. Walter H. Eddy, Ph. D.; and Robert A. Bories, General Manager, New York, the receipt being signed by Robert A. Bories, Treasurer. The postmaster in his letter of transmittal stated that the above-named concerns and persons received an average of 40 letters daily.

On December 1, 1944, we received a letter from Mr. Meyer Cohen stating that he represented the American Health Aids Company and requested a reasonable continuance.

On December 2, 1944, a letter addressed to the attention of Vincent M. Miles, Esq. signed by Louis N. Field, Attorney, was received stating that he represented the American Institute of Food Products and he also requested a reasonable continuance.

On December 5, 1944, Mr. Vincent M. Miles, Solicitor, wrote a letter to Mr. Meyer Cohen stating as follows:

10 This will acknowledge the receipt of your letter of the 1st instant, relative to the hearing in the matter of charges pending against the American Health Aids Co., *et al.*, of using the mails to defraud. The citation in this case was addressed on November 23, 1944, and your client was advised that the hearing would be held on December 15, 1944.

Because of certain representations which you make in your letter you request that the hearing date be continued for a period of one month or more. In reply I have to advise that it is contrary to the long established policy of this Department to grant extended continuances in fraud order proceedings. The public interest demands that such cases be heard and disposed of promptly and failure of the Post Office Department to handle such charges expeditiously would subject it to criticism on the part of victims of fraudulent schemes.

I must, therefore, advise you that your request for a continuance of one month in this case cannot be granted. However, as it is the desire of this office to accommodate the respondents to a reasonable extent, the hearing is being continued to December 29, 1944, at the same hour and place previously specified.

On the same day a similar letter was addressed to Mr. Louis N. Field, attorney for the American Institute of Food Products, *et al.*

On December 7, 1944, Mr. Meyer Cohen addressed the following letter to the Post Office Department, attention of Vincent M. Miles, (Reading):

Gentlemen:

Thank you for your letter of December 5 which grants a continuance of the hearing in the above-entitled matter to December 29, 1944.

Since I last wrote you, I have examined the available facts. May I respectfully make the following comments in requesting a disposition by stipulation at this time.

It is my opinion that the representations objected to were honestly made in complete reliance by these respondents upon the assurances of their advertising agencies as to the merit of the contents of the advertising copy for all purposes.

The cancellation of all the objectionable advertising, in every medium, has already been ordered by these respondents.

- 11 These respondents are willing to stipulate to cease and desist from making the representations contained in your memorandum of charges. Will you please advise me if this is agreeable to your Department, so that I may guide myself further in accordance with your adjourned date.

On December 13, 1944, Mr. Vincent M. Miles, Solicitor, wrote the following letter to Mr. Meyer Cohen, Counsellor at Law, 305 Broadway, New York 7, New York.

Mr. FAST. Excuse me but is this being considered as evidence. If it is I object to it.

Mr. RENNIE. These are preliminary pleadings.

Mr. FAST. I don't think a letter is a pleading. Probably the conclusion of your Solicitor but certainly is no pleading.

Assistant SOLICITOR. Well, it is only for the purpose of completing the record. It won't be considered as evidence with regard to any issues made by the real pleadings, that is, the memorandum of charges and your plea of general denial. I don't know what the contents of the letter are,—

Mr. FAST. (Interposing) I don't either.

Assistant SOLICITOR. —but I don't imagine it is anything except a letter acknowledging the former letter.

Mr. RENNIE. That is correct, sir. Suppose I read it off the record and then if you have any—

Assistant SOLICITOR. (Interposing) Read it into the record. It can be considered stricken if—

- 12 Mr. FAST. (Interposing) I don't know what the procedure is to make any reservation as to your rule but I want my objection to lie that this is not part of the record.

Assistant SOLICITOR. It is not part of the evidence but it is necessary in view of the fact that no procedure for service of process is set up by statute.

Mr. FAST. Well, we are here.

Assistant SOLICITOR. I understand that. But, as I understand, this letter pertains to—is a part of correspondence between the Solicitor and the other defendants whom you do not represent. Isn't that true, Mr. Rennie?

Mr. RENNIE. No, sir. This letter represents correspondence between the Solicitor and Mr. Cohen who was formerly counsel for Mr. Pinkus.

Mr. FAST. That's right. Mr. Pinkus is here and I make the representation that I am the sole representative.

Assistant SOLICITOR. Well, is there any denial that this other attorney Mr. Cohen at one time represented him?

Mr. FAST. There is no denial.

Mr. RENNIE. If your Honor please, this merely shows the complete transactions between the Post Office Department and the then counsel for the respondent and it is offered merely for the purpose of completing the record in order that the record may be full and complete.

Mr. FAST. That's just my point. I say that a letter is not a record. It is not part of a record.

13 Mr. RENNIE. It is a record of a transaction which has occurred.

Assistant SOLICITOR. I think in an administrative proceeding, Mr. Fast, we ought to have any information with regard to transactions between the respondent and this Department, particularly subsequent to the filing of the memorandum of charges.

Mr. FAST. Well, assuming for example that Mr. Miles (I give you my word of honor I don't know what's in the letter) assuming he says that these respondents are guilty of violating the law and that's why he would not consent to the type of stipulation suggested in Mr. Cohen's letter.

Assistant SOLICITOR. Well, that would be merely a conclusion. It wouldn't be a statement of fact that would be considered evidence any way. I don't think there is going to be—

Mr. FAST. (Interposing) If it is not to be considered as evidence I don't think it should be in the record.

Assistant SOLICITOR. Well, in an administrative proceeding we like to have the record complete in so far as those dealings between the Department and the respondents are concerned, so I overrule your objection. You may note an exception if you wish, sir, and we will consider it as noted. The record so shows it. Proceed Mr. Rennie.

Mr. RENNIE. (Reading):

14 Mr. Meyer Cohen,
Counsellor at Law,
305 Broadway,
New York 7, New York.

My dear Sir:

The receipt is acknowledged of your letter of December 7, 1944, relative to the charges of fraudulent use of the mails now pending in this Department against

the American Health Aids Co., *et al.* You state that your clients are desirous of disposing of this matter by means of a stipulation in which they undertake to discontinue the representations complained of in the memorandum of charges.

In this respect I have to state that it is contrary to the long-established policy of this Department to dispose of fraud order charges on a basis of a revision of the advertising claims made by the respondent, and for that reason I cannot accept the proposal set out in your letter.

However, inasmuch as your clients express a desire to obviate necessity for the holding of a fraud order hearing as to them, a stipulation providing for the absolute discontinuance of the business charged to be fraudulent and instruction to the postmaster at Newark, directing him to return mail addressed to the American Health Aids Co., and/or The Energy Food Center, stamped "Out of Business" will be acceptable. I am enclosing herewith a stipulation which so provides.

Should your clients desire to dispose of the charges against them without the necessity for a fraud order hearing, they may execute and return to this office the attached stipulation prior to December 16, 1944.

Very truly yours,

(Signed) VINCENT M. MILES,
Solicitor.

Mr. FAST. Are you offering the stipulation?

Mr. RENNIE. No, sir. No response to that letter was received in this office. On December 21, 1944, Mr. Meyer Cohen was advised by Mr. Vincent M. Miles, Solicitor, that due to a rearrangement of the fraud order calendar it will be necessary to continue the case from December 29
15 to January 10 at 10:00 a. m. That completes the correspondence in this case, your Honor.

This office had not been advised by Mr. Cohen or by the respondents as to the withdrawal of Mr. Cohen as counsel for the respondents. The first knowledge that we had that Mr. Cohen had withdrawn was a statement by Mr. Fast this morning.

Mr. FAST. Well, I was in touch with Mr. O'Brien last week.

Assistant SOLICITOR. By telephone Mr. Fast?

Mr. FAST. By telephone, yes sir.

Assistant SOLICITOR. Well, what is the American Health Aids Co. and Energy Food Center, is that a corporation?

Mr. FAST. They are not.

Assistant SOLICITOR. Are they trade names used by Mr. Pinkus?

Mr. FAST. That's right.

Assistant SOLICITOR. Is he the sole owner of this business?

Mr. FAST. Yes, sir.

Assistant SOLICITOR. And he is here present in person this morning and I assume that Mr. Pinkus will state for the record that he is now represented by you, Mr. Fast.

Mr. FAST. Oh, yes.

Mr. PINKUS. Mr. Fast represents me now in this case.

Assistant SOLICITOR. And that Mr. Cohen is no longer—

Mr. PINKUS. Mr. Cohen no longer represents me in this case. He has nothing to do with it.

Assistant SOLICITOR. I think that settles the matter very definitely because Mr. Fast as an attorney may now appear for this respondent.

16 Whereupon,

~~CHARLES E. DUNBAR~~, called as a witness for and in behalf of the Post Office Department and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. RENNIE.

Q. Will you please state your full name and occupation.

A. Charles E. Dunbar, Post Office Inspector.

Q. You have been sworn in this proceeding, have you not?

A. Yes, sir.

Q. Mr. Dunbar, in the course of your official duties did you investigate the use of the mails by the respondent in this case?

A. Yes, sir.

Q. Did you make inquiry of the postmaster at New York regarding the operation of this business?

A. Yes, sir.

Mr. FAST. I object to the question on the ground that we are not bound by any inquiries made by this gentleman of the postmaster either at Newark, New York or anywhere else.

Mr. RENNIE. If your Honor please, the position of the Government is that testimony of this type is admissible in

an administrative hearing. An administrative hearing is not bound by strict rules of evidence that would apply in a court of law.

17 Mr. FAST. I would like to find a case that would back up counsel's contention. After all we are still a country of laws and if any court would say that a conversation between two people not in the presence of a respondent is binding on a respondent then we have gone a long way from what the law used to be.

Assistant SOLICITOR. I think you will find, Mr. Fast, that the Inspector's testimony—I mean the Inspector's testimony with regard to this particular matter will not be evidence which will have value for proving the main issue in the case as to whether you are misrepresenting.

Mr. FAST. I don't know whether it will or not and I owe an obligation to my client to make an objection.

Assistant SOLICITOR. Well, I overrule your objection for the purpose of getting into the record the extent of the Inspector's investigation.

Mr. FAST. I ask for an exception.

By Mr. RENNIE.

Q. Will you state what your investigation disclosed?

A. I made an inquiry of the postmaster at Newark to determine the amount of mail received and the ownership of the business. He reported to me that the business was operated by Mr. and Mrs. Joe Pinkus and a Mrs. Seligman, at 871 Broad Street, Newark; that it had been in operation about three and one-half years; that the concern rented Box 72 at Newark on January 20, 1943; and that
18 approximately 700 pieces of first class mail were delivered daily, and that the name Energy Food Center, 947 Broad Street, was apparently formerly used by the concern.

Q. Mr. Dunbar, I hand you an envelope marked Government Exhibit No. 2, and ask that you examine the contents and state what they are.

A. Government Exhibit No. 2 contains advertising—

Mr. FAST. I object to that. I want to see it before it is offered in evidence.

Assistant SOLICITOR. Well, he is merely identifying what it is for the record. It will be handed to you before any part of it is read into the record.

The WITNESS. Government Exhibit No. 2 is copies—

Mr. FAST. (Interposing) He is reading it into the record now. That's what I objected to.

Assistant SOLICITOR. Well, he is not reading the advertisement. That's what pertains strictly to the issues. Let him say what it is that they are advertisements from certain papers or magazines and then you can object to them.

The WITNESS. Government Exhibit No. 2 is copies of advertising of the American Health Aids Company clipped from various magazines, such as "Secrets" issue of February, 1945, "Screen Stars" issue of February, 1945, "Real Story" issue of January, 1945, "All Story Love" November, 1944, etc.

(Envelope marked Government Exhibit No. 2 was handed to Mr. Fast for examination.)

19 Mr. FAST. I have no objection to the offer in evidence of the papers just shown by Mr. Dunbar. We admit that they are advertisements which were inserted by the client whom I represent.

Mr. RENNIE. If your Honor please, I would like to offer Government Exhibit 2 in evidence, sub exhibits 2-A to 2-G.

Mr. FAST. The respondent Pinkus does not object to the admission of Exhibit 2. I assume that Exhibit 1 is the memorandum, is it.

Assistant SOLICITOR. The memorandum of charges is not an exhibit, sir.

Mr. FAST. What is Exhibit 1?

Assistant SOLICITOR. They haven't yet introduced.

Mr. FAST. I was wondering why the skip, that's all.

Assistant SOLICITOR. They probably have them numbered in advance and they may not want to introduce their number 1. I don't know.

Mr. FAST. All right.

(Envelope containing advertisements of American Health Aids Co. clipped from various newspapers and magazines, marked Government Exhibit No. 2 and sub exhibit numbers, was offered and received in evidence.)

Mr. RENNIE. If your Honor please, I would like to read a typical ad, Exhibit 2-E, into the record.

Assistant SOLICITOR. Proceed.

Mr. RENNIE. This was extracted from the "All Story Love" magazine, November, 1944 issue. It is headed "HOW TO QUICKLY, SAFELY REDUCE the lazy way NO STRAIN DOCTORS APPROVE". (Reading):

20 Lose 3 to 5 lbs. a Week

... yet EAT PLENTY!

Lose inches of fat from abdomen, hips, thighs. Follow the KELP-I-DINE REDUCING Plan. Simply take a

half teaspoonful of KELP-I-DINE just once a day, at any meal. EAT AS YOU USUALLY DO. DON'T CUT OUT fatty, starchy foods, just cut down on them. THAT'S ALL THERE IS TO IT. SAFE, SURE. Lose excess weight NATURALLY and SAFELY. You won't feel hungry while you take off pounds and inches.

So stop wishing . . . and start getting back your slender lines, Reduce the LAZY WAY. Without strain or nervous irritation. Look and feel years younger. Send \$1.00 now for the KELP-I-DINE REDUCING PLAN and a full 30-day supply of KELP-I-DINE.

This advertisement shows a cut of a young woman on scales in the upper right hand side and a young lady in a bathing suit in the lower left hand corner. (Reading):

NO EXERCISE

NO HARMFUL DRUGS

ABSOLUTELY HARMLESS

LOOK BETTER!

FEEL BETTER!

Regain your shapely figure. KELP-I-DINE is absolutely harmless.

Grateful users say: "Doctor approved." "Wonderful, lost weight . . . gained pep." "Lost 18 pounds in 3 weeks." "Lost 21 pounds in 4 weeks."

MONEY BACK GUARANTEE

And then in the lower right hand corner there is an order blank for the product advertised.

The most recent advertisement that we have in our files is an advertisement clipped from "Secrets" magazine, February, 1945 issue, which I shall read for the record inasmuch as it is somewhat different from the advertisement inserted in the November issue of the "All Story Love" magazine.

21 Assistant SOLICITOR. That's designated by what Government exhibit number?

Mr. RENNIE. Designated Exhibit No. 2-A. (Reading):

REDUCE

SAFELY

NO EXERCISE

NO REDUCING

DRUGS

ABSOLUTELY

HARMLESS

LOSE 3 to 5 lbs. a WEEK YET EAT PLENTY!
ONE MONTH SUPPLY \$1.

Simply take a half teaspoonful of KELP-I-DINE with any meal (preferably at breakfast). EAT AS YOU USUALLY DO. DON'T CUT OUT fatty, starchy foods, just CUT DOWN—

Mr. FAST. (Interposing) It says "don't cut out" starches.

Mr. RENNIE. Yes, sir.

Mr. FAST. That's entirely different.

Mr. RENNIE. (Reading):

DON'T CUT OUT fatty, starchy foods, just CUT DOWN on them. That's all there is to it!—

Mr. FAST. (Interposing) Your Honor—

Assistant SOLICITOR. (Interposing) That's what I understood him to say. I may have been mistaken.

Mr. FAST. No, what he said in the beginning don't cut down on them.

Mr. RENNIE. I beg your pardon. The correct language is "DON'T CUT OUT fatty, starchy foods, just CUT DOWN on them." (Reading continued):

That's all there is to it!

FREE TO TRY

22 You can try KELPIDINE without it costing you a cent. Just order with the coupon and if you find KELPIDINE does not help you lose weight, return the remainder to us and we will refund your money in full. Nothing could be fairer. Act Now!

This advertisement shows a cut of a young lady on scales and underneath there is the following excerpt from a testimonial (Reading):

LOST 15 POUNDS

"I lost 15 pounds on my \$1.00 size Kelpidine."

Mrs. M. D.

At the bottom of the ad there is an order blank for KELP-I-DINE.

By Mr. RENNIE.

Q. Mr. Dunbar, did you engage in test correspondence with the respondents in this case under the name of Mrs. R. L. Dore, Richland, Pennsylvania?

A. Yes, sir.

Q. For what purpose?

A. To determine how the mails were being used.

Q. I hand you an envelope marked Exhibit No. 3, and ask that you examine the contents and state what they are.

A. Government Exhibit No. 3 is copies of test correspondence conducted over the name and address of Mrs. R. L. Dore, Richland, Pennsylvania, begun on July 29,

1944. It shows circular matter with the name of the American Health Aids and an envelope with the return card of Energy Food Center, and involves a remittance of One Dollar (money order). Also the receipt of a package of the preparation from the American Health Aids Company which was given sample number 1406 and delivered personally to Frank W. Casey, the chemist, for analysis and for a medical report.

23 Mr. RENNIE. I would like to offer Government Exhibit No. 3 in evidence, your Honor:

(Envelope containing Government Exhibit No. 3 was handed to Mr. Fast for examination.)

Mr. FAST. I do not object to the offer of these exhibits. (Envelope containing test correspondence over the name and address of Mrs. R. L. Dore, Richland, Pennsylvania, marked Government Exhibit No. 3 and sub exhibit numbers, was offered and received in evidence.)

Mr. RENNIE. Government Exhibit 3-A, your Honor, consists of a letter dated Richland, Pennsylvania, July 29, 1944, addressed to American Health Aids Co., 871 Broad St., Newark, New Jersey, (Reading):

Gents:

Saw your ad. Would like more information about your reducing.

Yours,

(Signed) Mrs. R. L. Dore

Exhibit 3-C is a pamphlet or folder entitled "REDUCE SAFELY". On the fore piece there is a picture of a young lady on scales, the page being headed in large letters "REDUCE SAFELY THE EASY KELP-I-DINE WAY! NO EXERCISE NO DRUGS ABSOLUTELY HARMLESS THOUSANDS REPORT LOSING 3 to 5 lbs. a Week." On the inside of the folder there are the following statements:

(Reading)

24 Have a Slender Figure . . . Without Starving!

Reduce Sensibly . . . Without Exercising

Improve Your Looks! Feel Full of Pep!

"Doctors Approve," Users Say!

KELP-I-DINE Offers a pleasant, scientific, guaranteed method of losing excess weight

Reduce pleasantly, quickly, and, best of all, easily. The new Kelp-i-dine method is a simple way that requires little effort or trouble. It's a commonsense plan that employs the latest knowledge of nutrition . . .

and it's free of harmful drugs, starvation diets, strenuous exercises, salts or physics. Your body is encouraged to use up its own fat, while supplying the system with the needed nutritive essentials. No tortuous diet is necessary . . . you merely correct those mistakes in eating that have probably made you fat and kept you fat. Your daily intake of food can be more than adequate . . . you eat plenty . . . you don't cut out starchy foods, you merely cut down on them! That's all there is to it! Kelp-i-dine is a purely vegetable product. It contains the minerals (including essential iodine) that satisfy hidden hunger, the false hunger that makes people overeat and add weight. It helps turn fat into energy . . . makes you feel full of pep. Thousands report using it with amazing results. It's the lazy way to reduce . . . to take off ugly, flabby fat.

USERS SAY:

"I lost 4 inches around the hips on my first package of Kelp-i-dine."

—F. P. K., Paterson, N. J.

"It works, I lost 10 pounds in two weeks."

—S. K., Brooklyn, N. Y.

"I went from 192 pounds to 176 pounds on my first package—a loss of 16 pounds."

—N. J. J. R., Newark, N. J.

"I lost 9 pounds in two 2 weeks, and I feel much better. My doctor approved."

—Mrs. B. F., Los Angeles, Cal.

Unconditionally Guaranteed — — Lose 3-5 Lbs. A Week

TRY THE TRIPLE—SIZE PACKAGE

GET 3 MONTH'S SUPPLY FOR \$2

GET SATISFACTORY RESULTS OR YOUR MONEY BACK

THE KELP-I-DINE PLAN

1. Eat as much food as you want, but don't eat between meals.
2. Eat plenty of lean meat (broiled or boiled, not fried), plenty of green vegetables (cooked or raw), plenty of fruits (canned or the unsweetened variety). Drink milk. Preferably buttermilk.
3. Don't cut out potatoes, corn, or beans entirely, cut down on them.
4. Don't eat thickened gravy or creamed soups, fried food, or excessive amounts of sweets.

5. Don't drink water with your meals, but drink at least four glasses of water between meals.
6. Walk as much as possible, avoid strenuous exercise.
7. Don't tell anyone about your diet.
8. Don't drink alcoholic beverages.
9. Take one-half teaspoonful of Kelp-i-dine with any juice or water, as directed on label, (or use it in place of salt).

On the reverse of the pamphlet there is a typical suggested Kelp-I-Dine diet which I will not read but should like to put into the record.

TYPICAL SUGGESTED KELP-I-DINE DIET

BREAKFAST

½ grapefruit, medium
1 boiled, poached or shirred egg
1 slice thinly buttered bread
Coffee, with 3 tablespoons skimmed milk
½ teaspoonful Kelp-i-dine

LUNCH

2 crackers
Egg salad, 2 hard-cooked eggs, sliced tomato, green pepper, celery, escarole, watercress and lettuce
Jello, if desired

DINNER

Any consomme or clear soup
Broiled cod fish or other lean fish
Steamed cauliflower, use ½ small head with 1 tomato, 1 helping
Steamed rice, ¼ cup
Relish, lettuce and sliced cucumber, with dressing, 2 tablespoons
Fresh fruit salad, diced banana, 1 plum, ½ tangerine, 1 helping
Coffee or tea with 3 tablespoons skimmed milk

26 Exhibit 3-F is a letter dated Richland, Pennsylvania, July 15, 1944, (Reading):

American Healthaids Co.
871 Broad St.
Newark, N. J.

Your circular received Am inclosing \$1.00 money order for Kelp-I-Dine to reduce weight as advertised. The weight is 193 lbs. age 54 height 5 ft. 5 inches. If the

Kelp-I-Dine will reduce to normal, send it—otherwise let me know.

Yours,
(Signed) Mrs. R. L. Dore

Exhibit 3-G is a form letter to the postmaster enclosing a money order in the amount of \$1.10 representing the purchase price of a dollar for the product.

Exhibit 3-J is a cylindrical shaped package bearing the label "Kelpidine (A Pacific Kelp) A nutritional supplement for increasing daily intake of iodine from ocean vegetation. AMERICA HEALTHAIDS CO." The label indicates the following directions (Reading):

One Half Teaspoonful Furnishes App. .3 Mgms. of Food Iodine, which is 300% of Minimum Human Daily requirement.

ADULTS: One half teaspoonful once each day with any meal.

CHILDREN: Under 16 years, $\frac{1}{4}$ teaspoonful once each day with any meal.

INSTRUCTIONS

Place one half teaspoonful of Kelp-i-Dine on tongue and swallow with any fruit juice or water to which may be added the juice of $\frac{1}{2}$ of a lemon.

Best results are obtained if taken before breakfast.

Add to soups or gravies to improve flavors.

Add to meat loaf or meat patties.

Use instead of salt.

Limit dosage to $\frac{1}{2}$ teaspoonful per day.

27 Exhibit 3-H is headed "DR. PHILLIPS KELPIDINE REDUCING PLAN SUGGESTED MENU FOR ONE DAY." This Exhibit 3-H accompanied the product just described. This concludes Exhibit 3.

By Mr. REKNIE.

Q. Mr. Dunbar, did you conduct test correspondence with the respondents in this case under the test name of Olivia G. Wells, of Hopewell, Virginia?

A. Yes, sir.

Q. For what purpose?

A. To determine how the mails were being used.

Q. I hand you an envelope marked Exhibit 4, and ask you to examine the contents thereof and state what they are.

A. Government Exhibit No. 4 is test correspondence over the name and address of Miss Olivia G. Wells, Hopewell, Virginia, and involves a letter addressed to Energy Food

Center, 947 Broad Street, Newark, and circular matter received in an envelope postmarked at Newark, New Jersey, September 2, 1944, with the return card of Walter H. Eddy, Room 3519, 60 East 42nd Street, New York City.

Q. Was any purchase made in this case?

A. No, sir.

Mr. RENNIE. I would like to offer in evidence Exhibit 4. (Envelope marked Government Exhibit No. 4 was handed to Mr. Fast for examination.)

Mr. FAST. No objection.

Assistant SOLICITOR. I don't know whether it was recorded on the record. You stated that respondent had no objection to the introduction.

Mr. FAST. No.

28 (Envelope containing test correspondence over the name and address of Miss Olivia G. Wells, Hopewell, Virginia, marked Government Exhibit No. 4 and sub-exhibit numbers, was offered and received in evidence.)

Mr. RENNIE. Exhibit 4-A is a letter dated August 30, 1944, Hopewell, Virginia, addressed to the Energy Food Center, 947 Broad Street, Newark, New Jersey, (Reading):

Gentlemen:

Please send me circulars and information about your products.

Yours truly,

(Signed) Miss Olivia G. Wells

Exhibit 4-C is a letter on the letterhead of the American Institute of Food Products, 75 West Street, New York, New York, addressed "Dear Friend" (Reading):

I am pleased to send you the enclosed leaflet containing information on Dr. Phillips' (Kelp-i-dine) Reducing Plan which you requested.

I recommend that you read it carefully, for this Plan has produced good results for others and is a safe way to lose excess weight.

You can obtain Dr. Phillips' Reducing Plan and a full month's supply of Kelp-i-dine by filling out the coupon in the leaflet and mailing it with \$1.00 in the enclosed envelope (no postage required). The combination will be sent to you promptly, postage prepaid.

Sincerely yours,

Walter H. Eddy (Facsimile signature)

Walter H. Eddy, Ph. D.

Exhibit 4-D is a folder or pamphlet entitled "Reduce Safely" showing on its front piece a cut of a man at a microphone underneath showing "DR. WALTER H. EDDY, PH. D. One of America's Leading Nutritionists TELLS HOW ON FOOD FORUM STATION WOR DR. PHILLIPS' (KELPIDINE) REDUCING PLAN".

29 The folder on the reverse side shows a cut of a young lady standing on a scale and is headed "LOSE 3 to 5 Pounds a Week . . . yet EAT PLENTY" (Reading):

Do you want to get rid of useless, bulgy fat that is making you look and feel years older than your actual age?

By following DR. PHILLIPS' KELPIDINE REDUCING PLAN you should lose 3 to 5 pounds a week—yet EAT PLENTY and gain better health and vitality at the same time.

DR. PHILLIPS' KELPIDINE REDUCING PLAN is the LAZY WAY to reduce . . . to take off excess pounds and inches from the abdomen, hips and thighs quickly and safely. You can slim down without doing tiresome exercises, without taking harmful reducing drugs, and without starving yourself.

DR. PHILLIPS' KELPIDINE REDUCING PLAN will help you lose excess weight NATURALLY and SAFELY. You won't feel hungry while you slenderize and regain your shapely figure, because DR. PHILLIPS' KELPIDINE REDUCING PLAN allows you to eat THREE sensible and satisfying meals each day. You DON'T CUT OUT bread, potatoes, gravy, etc.; you just cut down on them. And you take a half-teaspoonful of KELPIDINE just once a day, with your breakfast of fruit juice, egg, toast and coffee. That's all there is to it. No exercise necessary. No harmful drugs. Absolutely harmless.

DR. PHILLIPS' KELPIDINE REDUCING PLAN is a tested and sensible plan for people who want to lose weight SAFELY . . . at the rate of 3 to 5 pounds a week. Doctors approve of this method. The wonderful and beneficial results will amaze you.

• • •

The principles involved in weight reduction by diet are simple. To do the day's work, the body must have and burn a certain amount of fuel food daily. By reducing the amount of food intake we force it to burn

up some of its own body fat. So a reducing diet is simply a low-calorie diet.

But that low-calorie diet should be properly planned. To be fully satisfactory it must supply all the minerals and vitamins we require. It may be low in calories but it must supply all the protein we need for maintenance and repair of tissues. It must also satisfy hunger, must supply satisfying bulk without increasing calories, must satisfy the appetite.

30

To accomplish these results, a satisfactory reducing plan makes use of what may be called reducing menu aids; products which combine with a low-calorie diet to accomplish some or all of the desirable effects we have listed.

Kelpidine Is Such a Reducing Aid

It's used in conjunction with Dr. Phillips' low-calorie diet reducing plan. The addition of Kelpidine to this diet insures against iodine deficiencies, adds some bulk and reduces the feeling of hunger.

The following pages tell how to secure substantial weight reduction with Dr. Phillips' Kelpidine Reducing Plan.

The pamphlet also quotes excerpts from testimonials similar to those already read into the record.

Exhibit 4-G is a letter dated September 16, 1944, Hopewell Virginia, (Reading):

Dr. Walter H. Eddy
60 E. 42nd St
New York, N. Y.

Dear Sir:

I sent to the Energy Food Center at New York for information about their reducing and I have received a letter and circular from you with a return envelope to the American Health Aids Co. at Newark. I do not just understand whether you are running the business and whether I should send to the American Health Aids Co. instead of Food Products at New York or what I should do. I have also heard of Dr. Phillips in Cincinnati. I wonder if all these names mean the same firm. Would you be kind enough to let me know if you are connected with either company or whether I should send direct to you.

Yours truly,

-(Signed) Miss Olivia G. Wells

No response was received to this letter. That concludes Exhibit No. 4.

31 By Mr. RENNIE.

Q. Mr. Dunbar, did you engage in test correspondence with the respondents in this case under the name of W. B. Nauton, South Mountain, Pennsylvania?

A. Yes, sir.

Q. For what purpose?

A. To determine how the mails were being used.

Q. I hand you an envelope marked Exhibit 5, and ask that you examine the contents thereof and tell the court what it contains.

A. Exhibit No. 5 is test correspondence over the name and address of W. B. Nauton, South Mountain, Pennsylvania, and involves an inquiry to the American Healthaids at Newark, New Jersey, and replies received mailed at Newark September 2, in an envelope with the return card of Walter H. Eddy, New York City. No purchase was made in this case.

Mr. RENNIE. I offer Exhibit 5 in evidence, your Honor.

(Envelope marked Government Exhibit No. 5 was handed to Mr. Fast for examination.)

Mr. FAST. I do not object to the offer.

(Envelope containing test correspondence over the name and address of W. B. Nauton, South Mountain, Pennsylvania, marked Government Exhibit No. 5 and sub exhibit numbers, was offered and received in evidence.)

32 Mr. RENNIE. If your Honor please, the literature in this case is similar to that received in the previous test case and I will not read it into the record.

Assistant SOLICITOR. To whom was that test correspondence addressed by the Inspector?

Mr. RENNIE. American Healthaids Co., 871 Broad Street, Newark, New Jersey.

Assistant SOLICITOR. Exhibit No. 5?

Mr. RENNIE. Yes, sir.

By Mr. RENNIE.

Q. Mr. Dunbar, did you engage in test correspondence with the respondents in this case under the name of Ruth B. Kona, of Grottoes, Virginia?

A. Yes, sir.

Q. For what purpose?

A. To determine how the mails were being used.

Q. I hand you an envelope marked Exhibit No. 6, and I ask that you examine the contents and state what they are.

A. Government Exhibit No. 6 is test correspondence conducted over the name and address of Ruth B. Kona, Grottoes, Virginia, and involves a letter addressed to the American Healthaids Co., at Newark, and contains circular matter received in an envelope with the return card of the American Healthaids Co., 871 Broad Street, Newark.

Mr. RENNIE. I offer Exhibit No. 6 in evidence.

(Envelope marked Government Exhibit No. 6 was handed to Mr. Fast for examination.)

33 Mr. FAST. I do not object to the offer.

(Envelope containing test correspondence over the name and address of Ruth B. Kona, Grottoes, Virginia, marked Government Exhibit No. 6 and sub exhibit numbers, was offered and received in evidence.)

Mr. RENNIE. The literature in this test case, your Honor, includes a pamphlet headed "Reduce Safety" previously described (Exhibit 6-D), and also Exhibit 6-C which is a mimeographed or multigraphed letter on the letterhead of the American Healthaids Company, 871 Broad Street, Newark, New Jersey. The letter shows a cut in the upper right hand corner containing representations previously described and in addition thereto contains the following message (Reading):

READ THIS MESSAGE IF YOU WANT TO REDUCE FAT . . .

The best way of working toward a perfect figure is to do it gradually. Remember, you have been putting on those extra pounds and extra inches gradually—and if you follow the tested Dr. Phillips' Kelpidine reducing plan, you'll be sliming down nicely, without strain to your vitality.

So keep on eating, in moderation—lean meats, chicken, fish, eggs, citrus fruits and vegetables. Keep on taking Kelpidine—and by losing a pound or two or three each week you'll soon feel roomy in your old clothes and be able to choose a dress a size or two smaller than you now wear. Moreover, you'll have more zip and drive.

A GOOD RULE TO FOLLOW

The first rule for regaining a shapely figure is to stick to your diet and don't coddle a false appetite. Kelpidine is a great aid in giving you that feeling of "fulness" and satisfying the abnormal craving for food which your body does not really need.

NEW WAYS OF ENJOYING KELPIDINE

1. Mix Kelpidine with tomato juice.
2. Mix it in milk.
3. Sprinkle Kelpidine on meat.
4. Sprinkle Kelpidine on salads.
5. Use in soup.
6. Use in sandwiches.

Thousands of people swear by Kelpidine. They simply won't think of not having Kelpidine always handy. They know it does the work!

Even After You have Reduced To The Weight You Desire—Even After You Have Taken Off Excess Pounds and Inches—You'll Be Wise To Continue the Use of Kelpidine So As To Guard Against Your Tendency To Put On Needless Fat.

A full 3-months' supply (which is 3 times the size of the \$1.00 package) cost only \$2.00.

Mail us your order today—in the enclosed self-addressed envelope.

Sincerely yours,

AMERICAN HEALTHAIDS COMPANY

That concludes Exhibit No. 6, your Honor.

That concludes Mr. Dunbar's testimony as far as the Government is concerned. Cross examination, sir.

Cross Examination.

By Mr. FAST.

Q. Mr. Dunbar, I take it that all you did in connection with the investigation of this case was to see how the various letters were used for mailing purposes?

A. Yes, sir.

Q. You made no investigation as to the truth or falsity of any of the statements made in the exhibits?

A. No, sir.

Q. And do you know whether or not Mr. Pinkus still uses this form of advertisement marked 3-C in any of his mailings or advertisements?

35 A. No, I do not, sir.

Q. When was the last time that you sent one of these letters to either the Energy Food Center or the American Health Aids or Dr. Eddy?

A. October 19, 1944, to the American Health Aids Company.

Q. And do you know whether or not in response to your letter there was sent a circular similar to 3-C?

A. It differs in form—

Q. Well, it differs in some of the facts too, doesn't it?

A. Yes, sir.

Q. Will you be good enough to point out the letter that you sent to the American Health Aids as a result of which Exhibit 3-C was sent to you.

A. Government Exhibit 3-C was sent to R. I. Dore at Richland, Pennsylvania, as a result of my request of July 29, 1944, Government Exhibit 3-A, which is a copy of the letter addressed to the American Health Aids at Newark.

Q. Do you know whether any response to that letter was sent out by American Health Aids?

A. The response which contained a circular from American Health Aids was mailed at Newark August 11, 1944, in an envelope with the return card Energy Food Center.

Q. And that's marked?

A. As Government Exhibit 3-E.

Q. Mr. Dunbar, you don't know how many pieces of the daily mail that's delivered to Energy Food or the American Health Aids appertains to Dr. Phillips' Kelpidine Plan, do you?

A. No. The postmaster reported about 700 letters a day. I don't know the distinctions.

Q. The letters aren't opened are they?

A. No, sir.

Q. And isn't it a fact that on every one of the advertisements there is the statement money back guarantee or words to that effect?

Mr. RENNIE. Those representations speak for themselves.

Mr. FAST. I withdraw the question.

By Mr. FAST.

Q. Now, do you know who Dr. Eddy is?

A. No, I don't.

Q. You made no investigation about him at all?

A. No, sir.

Mr. FAST. I have no further questions.

Assistant SOLICITOR. Anything further, Mr. Rennie?

Mr. RENNIE. No, sir.

Assistant SOLICITOR. Call you next witness then.
(Witness excused.)

Mr. RENNIE. I would like to call Mr. Seward.

Whereupon,

37 E. W. SEWARD, called as a witness for and in behalf of the Post Office Department and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. RENNIE.

Q. Mr. Seward, will you state your full name and occupation please sir.

A. E. W. Seward, principal attorney for the Federal Communications Commission.

Q. Do you have access to the official files of the Commission?

A. I do.

Q. Have you secured copies from your official files of the radio continuity advertising the product "Kelp-I-Dine" inserted by the American Health Aids Company of Newark, New Jersey?

A. Yes, sir.

Q. I hand you an envelope marked Exhibit 2-R, and ask you to examine its contents and state what they are.

A. Exhibit 2-R-1 is a copy of a communication that was received by the Federal Communications Commission from the Bremer Broadcasting Corporation. The letter is dated September 8, 1944.

Mr. FAST. That's a letter from whom to who?

The WITNESS. From the Bremer Broadcasting Corporation to the Federal Communications Commission as just stated in the record.

Mr. FAST. I should object to it unless it can be proved that they were agents of the Energy or the American Health Aids.

38 Assistant SOLICITOR. Might it not develop, Mr.

Fast, that they are merely reporting the copy used or the script used?

Mr. FAST. I shan't object to the use of the script. I mean I don't want to be technical except that I don't know these people. I never heard of them.

Assistant SOLICITOR. Suppose you submit the exhibit now, Mr. Seward, to Mr. Fast and let him examine it. He may not have objection after he sees it.

The WITNESS. Without describing the document? I had only started to describe the exhibit.

Assistant SOLICITOR. Proceed with the description then I thought you had stated what it was.

The WITNESS. Attached to the letter is an affidavit dated September 8, 1944, signed by Irving Robert Rosenhaus, and attached also are four pages of what purports to be the continuity of a radio broadcast from Station WAAT.

Mr. FAST. I have been told that Bremer was our agent.

Mr. RENNIE. I offer this matter in evidence as Exhibit 2-R.

(Envelope marked Government Exhibit 2-R was handed to Mr. Fast for examination.)

Mr. FAST. I do not object to the offer. I am sorry that I objected before because I really didn't recognize the name.

Assistant SOLICITOR. Then that's offered as Government Exhibit No. 2-R?

Mr. RENNIE. Yes, sir.

Assistant SOLICITOR. And there's no objection on behalf of the respondent so it will be admitted.

(Envelope containing radio advertising of the American Health Aids Co., marked Government Exhibit No. 2-R and sub exhibit numbers, was offered and received in evidence.)

Mr. RENNIE. If there is no objection I suggest that this exhibit be considered as read.

Mr. FAST. No objection.

Assistant SOLICITOR. It becomes a part of the record so it may be treated as read.

(Exhibit 2-R-1)

September 8, 1944

Federal Communications Commission,
Washington 25, D. C.

Attention: T. J. Slowie, Esquire

Dear Sirs:

This is to acknowledge receipt of your letter of August 31, 1944, which actually came to my attention September 5, 1944, the day after Labor Day.

In accordance with your request, we are inclosing herewith duplicate copies of commercials used by American Healthaid Company in behalf of its product KELP-I-DINE:—

- (1) From June 28 through August 21, 1944
- (2) Copy used August 22 through August 24, 1944
- (3) Its most recent copy which started August 25, 1944.

We are, of course, very much interested in knowing whether there was anything wrong with the product or the copy. In this regard, you may be interested in knowing that this product is presently being advertised on Radio Stations: WOR, WPEN, KWTO, WDSU, WEVD, and was formerly advertised on the following stations: KSFO, WHK, WCOP, WELI, WJJD.

Also inclosed herewith are photostatic copies of letters from doctors with reference to the product which had previously been submitted to us.

You may be further interested in knowing that some time ago, the Station decided to change its policy with reference to accepting mail order programs. Accord-

40 ingly, on August 14, 1944, the American Healthaid Company was given four (4) weeks notice of termination of its contract, effective September 12, 1944. However, as a result of your inquiry and pending further information from you, we have taken them off the air as of today.

Very truly yours,

BREMER BROADCASTING CORP.

IRVING R. ROSENHAUS

Executive Vice-President

irr:ec

(Exhibit 2-R-2)

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September 8, 1944

Federal Communications Commission
(re: American Healthaid Company)

State of New Jersey, }
County of Essex. } ss.:

Irving Robert Rosenhaus, being duly sworn upon his oath deposes and says that the within information is true to the best of his knowledge and belief.

Irving Robert Rosenhaus (Signed)
Irving Robert Rosenhaus

Subscribed and sworn
to before me this 8th
day of September 1944.

(Seal) Esther Chazen (Signed)

Notary Public of New Jersey

My commission expires June 9, 1949

(Exhibit 2-R-3)

KELPIDINE TESTIMONIALS

JUNE 19, 1945....Present.

WAAT COMMERCIAL
Program Copy

(To be rotated one each day)

#1.

Please send me a two-month's supply of Kelpidine. The first box brought wonderful results. I lost around 12 pounds and feel fine. Send it as soon as possible.

(Mrs. Millie Fama, 56 Seafoam Ave., Singield Park,
Linden, N. J.)

#2.

I have been using your Kelpidine, which has been doing wonderful things for me. I lost six pounds in two weeks. When I told my best friend about it, she asked me if I could get some for her. I am sending three dollars. Please send a one-dollar package for my friend and a two-dollar can for me.

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(Miss Iazzetta, 403 Boulevard, Bayonne, N. J.)

#3.

Enclosed please find one dollar for a one-month's supply of Kelpidine. Results were wonderful with the first can. I lost 12 pounds the first two weeks. Please rush the order.

(Mrs. Casey McKinley, 810 Jim St., San Antonio, Texas)

#4.

For the enclosed two dollars please send me your large, three-month's supply of Kelpidine. I have lost eighteen pounds in five weeks and am not hungry. I feel better than I did before beginning the Kelpidine reducing plan. Please send the Kelpidine as soon as possible as I don't want to run out.

(Gladys Whitney, 720 Fort Washington Ave., N.)

(Exhibit 2-R-4)

WAAT COMMERCIAL
Program Copy

KELPIDINE

June 28,—August 21, 1944

OPENING

Would you like to reduce quickly and safely with the least amount of trouble? Would you like to lose three

to five pounds of weight a week without exercise, without starvation diets, without drugs, or harsh laxatives? You can do it with Kelpidine. To get a one-month's supply of Kelpidine, postage prepaid, send a dollar bill, check or money order to KELPIDINE, care of me, Dave Miller, Station WAAT, Newark 1, New Jersey.

CLOSING

Every day we receive letters from people everywhere telling us about the pounds and pounds of weight they lost with Kelpidine. Here is one letter from a lady who reduced quickly with Kelpidine. (READ TESTIMONIAL) If you want to lose three to five pounds a week safely, quickly, easily, the best way of losing weight is to just follow the Kelpidine plan. Take a half teaspoonful of Kelpidine with any meal, preferably at breakfast—eat sensibly, and that's all there is to it. With Kelpidine you don't cut out bread, potatoes, or the other nice things you like to eat—just cut down on them. Doctors approve of the Kelpidine Plan. It's so safe that children can follow it. A month's supply of Kelpidine costs only \$1.00 and it's sold on a money-back guarantee. If you are not satisfied, if you don't find it the easiest, lazy way to lose weight, if you don't

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lose 3 to 5 pounds a week, return the unused portion, and your money will be refunded. To get a month's supply of Kelpidine, postage prepaid, send a dollar bill, check or money order for just one dollar—to Kelpidine, care of me, David Miller, Station WAAT, Newark 1, New Jersey—or send a postcard, and you will receive a 30-day trial supply of Kelpidine by paying the postman \$1.00 plus postage when the package arrives. If you wish the large, economy size of Kelpidine, a full 3 months supply, send \$2 in an envelope. The same guarantee applies.

(Exhibit 2-R-5)

WAAT COMMERCIAL
Program Copy

KELPIDINE
August 22-24

OPENING

Ladies and gentlemen, too—Are you carrying around a lot of excess weight? Have you noticed that you don't look as well as you used to in bathing suit? There is now a new, sensational scientific and guaranteed plan for reducing—that Kelpidine Plan, that helps you lose three to five pounds a week and permits you to

eat such things as ice cream, cake, candy, beer and all the other things you like. Remember with the Kelpidine Plan, you don't cut out ice cream, cake, candy, or any other things you like to eat. You just cut down on them. It's the new Kelpidine Plan, approved by doctors. So easy to follow you will be amazed at the results. To get a one-months supply of Kelpidine, and the Kelpidine Reducing Plan, send a dollar bill, check, or money order to me, Dave Miller in care of Station WAAT, Newark, New Jersey.

(Exhibit 2-R-6)

WAAT COMMERCIAL
Program Copy
OPENING

KELPIDINE
August 25 to present

Ladies—and gentlemen, too—the KELPIDINE reducing plan helps you to lose three to five pounds a week without dieting. To get a one-month supply of KELPIDINE, and the Kelpidine reducing plan, send a dollar bill, check, or money order to me, Dave Miller, in care of Station WAAT, Newark 1, New Jersey.

MIDDLE

Every day the mailman brings letters from both men and women who lost 3 to 5 pounds a week with the

43 KELPIDINE reducing plan. One lady writes, "My doctor recommended that I take Kelpidine to reduce, even though I was already taking the special tablets he was giving me. I lost 18 pounds in three weeks."

A man from Brooklyn writes, "even though I am diabetic, my doctor had me take Kelpidine. I lost 6 pounds in ten days." A women (sic) from Newark writes, "I lost 14 pounds in one month with Kelpidine and I never get hungry. I am 62 years old and have two grandchildren." You, too can lose weight with Kelpidine, it makes no difference if you are 16 or 60, or if you have diabetes, rhumetism (sic) or any other ailment. Kelpidine is always safe and doctors approve the Kelpidine plan. You simply take a half teaspoon of Kelpidine once each day and eat three regular sensible meals. Kelpidine decreases your appetite. If you don't lose weight, return the unused portion and your money will be refunded. To get a full one-month's supply of Kelpidine, send a dollar bill, check or money order to Kelpidine, care of me, David Miller, Station WAAT, Newark 1, New Jersey. Or, if you wish a three month

supply, send \$2 in an envelope. The same money-back guarantee applies. If you want Kelpidine, sent C.O.D., send a penny post card or letter to Kelpidine, care of me, David Miller, Station WAAT, NEWARK 1, New Jersey & pay the postman \$1 plus postage. Remember, Kelpidine is guaranteed. You have nothing to lose except weight.

Mr. RENNIE. Cross examination, sir.

Mr. FAST. No.

Mr. RENNIE. May Mr. Seward be excused?

Assistant SOLICITOR. Counsel for the respondent announced no cross examination, so Mr. Seward may be excused. Thank you Mr. Seward.

(Witness excused.)

Mr. RENNIE. Mr. Casey.

44 Whereupon,

FRANK W. CASEY, called as a witness for and in behalf of the Post Office Department, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. RENNIE.

Q. Mr. Casey, will you state your full name and occupation.

A. Frank W. Casey, Chemist with the Food and Drug Administration.

Q. Will you state what degrees you hold, Mr. Casey, and what is your professional experience.

A. I graduated from the University of Michigan in 1916 with a B. S. degree, and since that time my chemical experience has been state drug chemist of Michigan; in charge of the chemical laboratories at Columbia Chemical Company, Barberton, Ohio; chemist with the Internal Revenue, and now with the Food and Drug Administration for the past fifteen years.

Q. Mr. Casey, I hand you a package marked Exhibit 3-K and ask that you examine it and state what it is, and whether or not you have made a chemical analysis of the contents.

A. Sample 1406 of Kelpidine is identified by me by my initials FWC, the date 8-23-44, the date upon which I received it from Inspector Dunbar.

Q. What does the analysis show, Mr. Casey?

45. A. It shows that it is a kelp. The weight of a half of a level teaspoon amounted to 1.906 grams. It was assayed for iodide and was found to contain four tenths of a milligram of iodide in half a teaspoon.

Mr. RENNIE. Your witness, sir.

Cross Examination.

By Mr. FAST.

Q. Mr. Casey, you have been a chemist for about how many years?

A. Neary thirty.

Q. You say that you examined Exhibit 3-K, your number 1406, and you found it to contain kelp, is that right?

A. Sea weed kelp, yes.

Q. Do you know whether it has any other name in chemistry?

A. Yes, they've called it bladder-wrack, they've called it sea-wrack, and fucus I think is the correct name.

Q. Fucus is the proper name for it?

A. That's the Latin name for it.

Q. And in your study of chemistry have you ascertained the use of fucus?

A. No, I am not a doctor.

Q. Did you ever have occasion to look the word "kelp" up or "fucus" in a chemistry book?

A. Yes. Kelp they take it from various parts of France, and around the world they take sea weed and they
46 burn it, char it, and when they get down to their product they use a lot of it for making soap, a lot of it for extracting iodine, and some of them use it for food and so forth.

Q. Do you know whether or not it is used for obesity?

A. No, sir.

Mr. RENNIE. I object, your Honor.

Assistant SOLICITOR. He says he doesn't know.

By Mr. FAST.

Q. I show you a photostatic copy of page 246 of Merck's Index, and ask whether you have ever seen this before.

Mr. RENNIE. I object, your Honor.

Mr. FAST. I withdraw the last question and ask it over again.

By Mr. FAST.

Q. Have you ever—First, let me ask you if you know what business Merck is in?

A. Yes, sir.

Q. What business?

A. Why, they're manufacturers of pharmaceuticals and chemicals, heavy and light.

(Here followed questions and answers which the Solicitor ruled improper and granted a motion by Government Counsel that the same be stricken physically from the record and to which the exception of respondent's counsel was noted.)

(Witness excused.)

47 Mr. FAST. I would like to ask your Honor, I have gotten photostatic copies of a number of books that in the event your Honor feels that we ought to have the original books that I be given an opportunity at some near date to present them. As a matter of fact I am going to spend most of the noon hour going to a book store and see if I can get them today.

Assistant SOLICITOR. You mean for the purpose of introducing them into evidence here?

Mr. FAST. No, I am going to cross examine the Government's witnesses.

Assistant SOLICITOR. By the same method you offered this morning?

Mr. FAST. No, by finding out whether certain books are standard books. I have some.

Assistant SOLICITOR. Well, what's the purpose of finding out if the books are standard books if it is not for the purpose of quoting those books—

Mr. FAST. (Interposing) Oh, I expect to present medical testimony—I withdraw that. I expect to ask the witnesses for the Government to tell me about certain acknowledged uses of fucus which is kelp, and I shall expect to use medical authority to back us up. I appreciate the books themselves are not evidential but I do have a right to cross examine—

Assistant SOLICITOR. Certainly you have.

Mr. FAST. —and have a right to use textbooks—
48 medical textbooks used in colleges as a basis for the presentation of my case.

Assistant SOLICITOR. As I understand the laws of evidence on that subject, a lawyer may have a textbook and ask a question, which is his own question—the lawyer's own question—even though he may be reading but he is not identifying it as something from a textbook, because that's hearsay evidence and the author isn't here for cross examination.

Mr. FAST. That's right. You are positively right about that.

Assistant SOLICITOR. But you may have the book in front of you. There's no objection to that.

Mr. FAST. Well, I may do this: I may be obliged under these circumstances to bring a doctor in—I expected Dr. Craster to testify only as to one aspect of the case—I may want to use either him or some other doctor as an expert on the medical aspect of the case. I am not prepared to do it today.

Assistant SOLICITOR. Well, I understood that you were going to have a doctor here though Saturday. Couldn't you do it at that time just the same?

Mr. FAST. Oh yes, I don't want any extra time. I want to get rid of the case. I'll try my hardest to get him here by Saturday. If I can't get Dr. Craster I will probably have to get some other doctor but I'll bring somebody here.

Assistant SOLICITOR. Well, you will have full opportunity to introduce whatever medical proof you wish but when you come to offer textbooks—

49 Mr. FAST. (Interposing) I am not doing that, I never do. I know that's not proper. I know that unless the author is present that I may not introduce the textbook in evidence and I didn't intend to.

Assistant SOLICITOR. If you read from a textbook and ask the doctor's opinion of the author of the textbook and of the text, then aren't you by indirection getting the text into the record as evidence?

Mr. FAST. Well, I am by indirection but counsel for the Government seems to be so fearful about that that I want to get it in by direct evidence.

Assistant SOLICITOR. Well, you may have direct evidence from any doctor—any qualified physician—who can qualify as such. You may of course introduce his testimony.

Mr. FAST. The point is I may not have him here today.

Assistant SOLICITOR. We'll take care of that because we have already agreed that you may introduce testimony Saturday and you may introduce that other testimony in addition to the testimony already agreed upon.

Mr. FAST. Fine. Because I agreed with Mr. O'Brien just to use Dr. Craster. Now, I suppose it will be understood that I may use any other doctor.

Assistant SOLICITOR. I see no reason why you shouldn't,

Mr. FAST. Thank you.

50 Assistant SOLICITOR. As long as there's an adjournment until Saturday for the purpose of the one doctor.

(The hearing was recessed at 12:20 p. m. until 2:15 p. m. of the same day.)

AFTER RECESS

(Dr. Joseph Thomas Roberts was sworn as a witness in behalf of the Post Office Department by a Notary Public of the District of Columbia.)

Whereupon,

DR. JOSEPH THOMAS ROBERTS,

called as a witness for and in behalf of the Post Office Department and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. RENNIE.

Q. Dr. Roberts, will you state your full name and occupation please.

A. My name is Joseph Thomas Roberts. Occupation is physician and teacher in medical schools. I hold the position of Chief Medical Officer in the Department of Medicine at Gallinger Municipal Hospital here in Washington. Also the positions of Adjunct Clinical Professor of Medicine at the Schools of Medicine of Georgetown University and George Washington University.

Q. Will you please state what degrees you hold, the period of and place of training.

Mr. FAST. I would like to state for the record that the Doctor qualifies as a very expert physician.

Assistant Solicitor. Mr. Fast, there are certain respondents absent today. We appreciate your concession for the respondent but in view of the absence of other respondents I think that had better be in the record.

Mr. FAST. All right.

The Witness. The question is regarding my degrees?

Mr. RENNIE. Yes, what degrees do you hold, the period of and place or places of training.

The Witness. The degree of Bachelor of Arts obtained from the Southwest Texas Teachers College, 1929; the degree of Master of Science from Tulane University; the degree of Doctor of Medicine from Tulane University, and the degree of Doctor of Philosophy, Ph. D., also from Tulane University. Training in addition to that consist in internship in internal medicine and three years fellowship in internal medicine at Western Reserve University and Lakeside Hospital in Cleveland, Ohio. Further training has been in connection with experience obtained as a teacher in medical schools both at Western Reserve University,

University of Texas, Tulane University and the two medical schools here in Washington, Georgetown and George Washington.

By Mr. RENNIE.

Q. Now Doctor, I believe that you said that you
52 had a Ph. D. In what field did you obtain the Ph. D.?

A. I obtained the Ph. D. degree from the medical school at Tulane University in the subjects of anatomy and physiology.

Q. Are you a member of any medical societies?

A. Yes, I am.

Q. Will you state what they are?

A. May I read a list of those?

Q. Yes, sir.

A. Fellow of the American Medical Association; Associate of the American College of Physicians; a member of the Texas State Medical Association, the South Texas District Medical Society, the Galveston County Medical Society, the Southern Medical Association, the American Federation for Clinical Research, the American Association of Anatomists; a fellow of the American Association for Advancement of Science; a member of the American Heart Association, the American Association of University Professors, the International Association of Medical Museums, the Texas Academy of Science, the New Orleans Academy of Sciences, the Texas State Heart Association, the Academy of Medicine at Cleveland, Ohio, Cleveland Medical Library Association, the Medical Society of the District of Columbia, and the Washington, D. C. Heart Association. I believe that includes all of them.

Q. I believe that you stated that you did work in the field of internal medicine. Would the scope of internal medicine include the treatment of obesity?

53 A. Yes.

Q. Have you arranged for the prescribing of reducing diets for persons who are obese and for sick persons with other diseases who need to reduce?

A. Yes, that is part of our usual work.

Q. Doctor, are you qualified by your training to arrange for reducing dietaries?

A. Yes, I am.

Q. Are you familiar with the therapeutic and nutritional values of kelp?

A. Yes.

Q. Doctor, does your training qualify you to be familiar

with the effects of iodine and the other minerals contained in kelp?

A. Yes, it does.

Q. Doctor, will you please define obesity?

A. Obesity I believe could be defined as a state in which a person weighs more due to accumulation of fat or adipose tissue throughout his body so that he weighs more than is thought to be healthy or normal.

Q. Could you state the cause, or causes if there be more than one, of obesity?

A. Well, for all practical purposes I believe obesity is due to overeating. There are other factors which enter into this probably of minor degree but by and large
54 obesity is due to an individual eating more than he needs to take care of the amount of energy he expends in his daily activities. There are, as I said, probably other minor causes or possibly debatable causes which might enter in but by and large obesity is due, in my opinion, to the patient or the person eating more than he should.

Q. There are a number of causes for the overeating of the individual, is there more than one factor that enters into that?

A. Yes, there are other factors that enter into a person having the habit or practice of eating more than he should.

Q. Could you specify some of those factors, Doctor?

A. I believe generally the person eats more than he should as a matter of habit that he gets into. During the time when an individual is passing through adolescence, being very active and also growing, he develops habits of eating certain amounts of food. Later on in life as he becomes more sedentary and doesn't have as much exercise to do and as he ceases to grow with adolescence he maintains that habit of eating certain amounts of food as his mother, or wife, or cook, or whoever serves his food continues to serve the same proportions or the same size portions of food as a matter of habit or custom. In addition to that as a person gets past adolescence, gets on a financially better ground, he is able to buy foods which tend to cause the formation of more fat. Habit then and ability to buy whatever he may have an appetite or a desire for are two important factors in this tendency to overeating. Another factor

is appetite for foods that he sees other people
55 eating. Circumstances where he eats his meals may stimulate him to or may encourage him in the practice of eating more than he really needs. People develop

a state where they get a certain sort of pleasure of having a sensation of fullness and they will continue to eat with each meal to such an extent that this pleasurable or pleasant sensation of fullness develops even though they are eating considerably more food than is necessary to furnish them with the energy that they need for their daily activity.

Q. Doctor, will $\frac{1}{2}$ teaspoonful per day of kelp reduce the weight of an obese person?

A. And that alone?

Q. Yes, sir.

A. I think if a person ate nothing but $\frac{1}{2}$ teaspoonful of kelp per day over a period of time—

Q. (Interposing) No, my question I believe is not clearly stated, Doctor. Will $\frac{1}{2}$ teaspoonful per day of kelp in addition to the regular daily diet of the patient reduce the weight of an obese person?

Mr. FAST. I object to that because the advertising matter of the respondent does not say that you can eat just as much as before but it does say that you must reduce, and I don't think even the Doctor, as well qualified as I think he really is, would be able to answer the question intelligently without a greater basis as to what the individual purchaser of "Kelp-I-Dine" would eat. In other words, if a
56 purchaser of "Kelp-I-Dine" would eat considerable carbohydrates, more than is set forth in the plan which we send out with the "Kelp-I-Dine", I would be willing to admit that such person would not be able to reduce as much as one who ate correspondingly less. I therefore object to the question on the ground that it is an unfair and not an intelligible question.

Mr. RENNIE. The question is a hypothetical question and I submit it is proper. It is submitted for the purpose of demonstrating the ability of kelp in itself to affect the excess fat of the person taking the kelp, that is, the therapeutic value of kelp itself apart from the diet.

Assistant SOLICITOR. Mr. Fast, on the issue here doesn't he have a right to ask that question to show the therapeutic value of kelp so as to show or to have the record show what value the kelp would have in connection with the diet. Now, as I recall your advertising, it doesn't claim that kelp by itself will effect the reduction in weight but it does recommend the use of kelp in connection with diets.

Mr. FAST. With a diet.

Assistant SOLICITOR. Yes, with a diet.

Mr. FAST. The diet which we send out.

Assistant SOLICITOR. But at the same time I think they have the right to ask the therapeutic effects of kelp in connection with reducing. You recommend the two together and I think it is a competent question to ask what the therapeutic effects of kelp would be in connection with a treatment for reduction.

57 Mr. FAST. That isn't the question. I agree with your Honor that the questions which will lead to the answers to your Honor's suggestions are perfectly in order. I don't think that the present question is the one that will answer that. I don't object to his asking the Doctor what the therapeutic value of kelp is.

Mr. RENNIE. Well, that was the context of the question.

Mr. FAST. I don't think so.

Mr. RENNIE. I would like to state—we are talking about the advertising claims now—that the respondent indicates in his advertising claims that the diet alone is not sufficient but that this kelp does something, and what I am trying to get at and ask is what it does.

Mr. FAST. I don't object to that.

Assistant SOLICITOR. There is no objection made to that, but as I recall your question, Mr. Rennie, it was what effect it would have with the ordinary diet.

Mr. RENNIE. Yes.

Assistant SOLICITOR. Well, of course, it's assumed though Mr. Fast in determining what therapeutic effect kelp by itself will have, it's assumed that the party will not make a change in diet. He can ask the question what kelp by itself would produce and then kelp plus diet. Either one of you could develop that.

Mr. RENNIE. I might state that—

Mr. FAST. (Interposing) Well, I withdraw my objection.

58 Mr. RENNIE. I will re-state the question, Doctor.

The WITNESS. Will you re-state the question please?

Mr. RENNIE. All right.

By Mr. RENNIE.

Q. Doctor, will $\frac{1}{2}$ teaspoon per day of kelp taken in addition to the individual's regular diet reduce the weight of an obese person?

A. No, it will not, in my opinion.

Q. Doctor, will $\frac{1}{2}$ teaspoon per day of kelp help turn the fat of the obese into energy?

A. Will you state that again?

Q. Will $\frac{1}{2}$ teaspoon per day of kelp help turn the fat of the obese into energy?

A. No, it won't.

Q. In other words, Doctor, would such dosage of kelp turn foodstuffs which would otherwise be deposited as fat into energy or heat?

A. I believe you will have to re-state that one. Repeat it rather.

Q. Would such dosage, that is, $\frac{1}{2}$ teaspoon per day of kelp, turn foodstuffs which would otherwise be deposited as fat into heat or energy?

A. In my opinion it will not.

Q. Doctor, if an obese person reduced his calorie intake sufficient to reduce 3 to 5 pounds per week would he generally experience increased craving or desire for food?

59 A. Yes, he would.

Q. Doctor, I hand you a copy of the Dr. Phillips reducing diet and ask if an obese person eats the foods suggested and $\frac{1}{2}$ teaspoonful of kelp daily will he experience an increased craving for food generally?

(Circulars containing the diets, Government Exhibits 3-C and 3-H, were handed to the Doctor for examination.)

A. Which one of these are you asking about?

Q. Well, I would like to take them separately, Doctor. I would like your separate opinions. I think the diets are slightly different.

A. Yes, looking at them hurriedly I would say—

Mr. FAST. (Interposing) I would suggest that the Doctor refer to them by exhibit numbers so there will be no misunderstanding.

ASSISTANT SOLICITOR. Will you point them out to him, Mr. Fast?

Mr. FAST. Certainly. This is 3-H and this is 3-C. The red one is 3-C.

Mr. RENNIE. Would you like for me to re-state the question, Doctor?

The WITNESS. If you will, please.

By Mr. RENNIE.

Q. Doctor, if an obese person eats the food suggested on either of those menus and $\frac{1}{2}$ teaspoonful of kelp daily will he generally experience an increased craving for food above a normal diet? That is to say, would a person eating
60 these diets be hungrier than he normally would be in eating a normal diet?

A. You have two different questions there. Repeat the question that you want me to answer.

Q. If an obese person, that is, a fat person, eats the foods suggested on these diets and in addition thereto $\frac{1}{2}$ teaspoonful of kelp daily will he generally experience a craving or an increased craving for food?

A. Yes, I think an obese person will experience an increased craving for food or more hunger, that is, when he eats food listed according to either one of these diets to a greater degree than he would by the diet which he has been accustomed to.

ASSISTANT SOLICITOR. When you say either one of those diets, Doctor, you mean Government Exhibit 3-C or 3-H, the two that you have in your hand.

THE WITNESS. I believe both diets indicated by the numbers 3-H and 3-C, according to simple inspection here and without actual calculation of the values of them, are considerably lower in caloric value than the diet being followed by a person who is overweight or obese. As near as I can tell from looking at these things, the one indicated by the number 3-C, which also has the number 3-E on it—

ASSISTANT SOLICITOR. (Interposing) 3-E is on the envelope, Doctor.

THE WITNESS. —provides considerably less food as well as less choice of alternate foods than the diet indicated by number 3-H does.

61 **MR. RENNIE.**

Q. Do you think that the same or a similar craving would exist whether or not the kelp was taken? Do you think the kelp would make any material difference in the amount of hunger that the obese person would experience?

A. I think the person would have the same amount of hunger when he follows this diet alone as when he follows this diet with kelp.

Q. Doctor, is it true or not true that persons losing from 2 to 5 pounds per week by restricting their diet generally experience discomforts, such as increased desire or craving for food or an increased appetite or hunger?

A. Yes, they do.

Q. Would you say that an obese person who ate as much food as he wanted and took in addition thereto a half teaspoon per day of kelp would be likely to lose from 3 to 5 pounds per week?

MR. FAST. Now, I haven't been objecting but I do object to this question, because nowhere in any of the advertisements is there any statement which indicates that a person can eat as much as he formerly ate; that all he needed to take was "Kelp-I-Dine" to reduce. All of it says take less.

Assistant SOLICITOR. I have not made a careful examination of the advertising matter but it is my recollection that two expressions were used therein: One, that you do not have to cut out fattening foods but you do have to cut down the fattening foods.

62 Mr. FAST. That's right.

Mr. RENNIE. I call your Honor's attention to Government Exhibit 2-A which says among other things (Reading):

"LOSE 3 to 5 lbs. a WEEK YET EAT PLENTY!

"Simply take a half teaspoonful of KELP-I-DINE with any meal (preferably at breakfast). EAT AS YOU USUALLY DO. DON'T CUT OUT fatty, starchy foods, just CUT DOWN on them."

Now, if your Honor please, in Exhibit 2-R an excerpt from the radio advertising says this: "There is now a new, sensational scientific and guaranteed plan for reducing . . . that Kelpidine Plan, that helps you lose three to five pounds a week and permits you to eat such things as ice cream, cake, candy, beer and all the other things you like. Remember with the Kelpidine Plan, you don't cut out ice cream, cake, candy, or any other things you like to eat. You just cut down on them." I submit that the question is proper in view of the representations.

Assistant SOLICITOR. Even in view of the fact that the statement involves a cutting down of the quantity of food. They state that the quality of food or the caloric value of the food may be changed, but they recommend that the quantity be cut down. Now, they don't say to what extent it should be cut down until the post-sale literature is received. And as I recall your question, Mr. Rennie, it was with regard to—

Mr. RENNIE. (Interposing) The question was this, your Honor: Would an obese person eating as much as he wanted and taking a half teaspoon of kelp daily be likely to lose from 3 to 5 pounds of fat per week?

63 Mr. FAST. And I object to that as not being within the issues of this case.

Assistant SOLICITOR. I don't believe that there's a charge in the memorandum of charges that you can eat all you want. I mean that there is no charge in the memorandum of charges that the respondent is representing that one can eat all he wants.

Mr. RENNIE. Well, I think there is a charge to the effect that he can eat plenty.

Mr. FAST. Well, eat plenty doesn't that. "Plenty" means sufficient.

Assistant SOLICITOR. Well, "plenty" would mean sufficient. I don't recall any advertising and certainly the excerpts from the advertising which you—

Mr. RENNIE. (Interposing) Well, I withdraw the question, your Honor.

Assistant SOLICITOR. —read don't sustain your position.

Mr. RENNIE. Well, the Government withdraws that question.

By Mr. RENNIE.

Q. Now, Doctor, in order to preserve the continuity of this matter I believe that the last question which we asked you was whether or not a person losing from 3 to 5 pounds per week by restricting their diet would generally experience discomforts, such as increased desire or hunger, and I believe that you replied that it would. Now, going on to the next question: Is this hunger due generally to a lack of iodine and other minerals or to a lack of calories in the diet?

64 A. It is due to a lack of calories in the diet.

Q. Would such hunger be satisfied by the taking of a half teaspoonful daily of kelp?

Mr. FAST. I object to that. Nowhere do we say that. That's not within the issues.

Assistant SOLICITOR. Repeat the question, Mr. Rennie. I didn't get the first part of it clearly.

Mr. RENNIE. Would this hunger be satisfied by the taking of a half teaspoonful daily of kelp?

Mr. FAST. I object to that. That doesn't appear in any of the exhibits that have been offered.

Assistant SOLICITOR. Aren't you asking the question though as a part of the prior question or as supplementary to the prior question as I get it. You first asked whether with this diet he would have the hunger and then if he had that hunger from a reduced diet would this kelp alone satisfy the hunger. That was my understanding in the sequence that the questions were asked.

Mr. RENNIE. That's correct, your Honor.

Assistant SOLICITOR. That was my understanding.

Mr. FAST. Of course, I object on the ground that it is not within the issues of the charges set forth in the memorandum.

Assistant SOLICITOR. It is as a supplement to the former question or as a part of the former question. The two taken together makes the second question competent. I overrule your objection, Mr. Fast.

65 Mr. FAST. I ask for an exception.

By Mr. RENNIE.

Q. Will you answer that question, Doctor?

A. Will you repeat the question.

Q. The second question is: Would this hunger, that is, the hunger attendant a diet sufficient to reduce from 3 to 5 pounds per week, be satisfied by the taking of a half teaspoonful daily of kelp?

A. No, it wouldn't.

Q. Would any of the causes of obesity be removed by the taking of a half teaspoonful of kelp daily?

Mr. FAST. I object to that as not being within the issues or within the advertisements of the respondent.

Assistant SOLICITOR. Well, that goes to the question of the therapeutic value of kelp particularly if he amends his question by saying be removed or alleviated, or relieved.

Mr. RENNIE. If your Honor please, the respondent claims that this product will help turn fat into energy.

Mr. FAST. Where is that said? I have looked at this case for weeks and I don't see it.

Mr. RENNIE. I would like to call your Honor's attention to Government Exhibit 3-C which states among other things, "It (referring to Kelp-I-Dine) helps turn fat into energy." And I asked the Doctor if kelp would do that.

Mr. FAST. Where is that, Mr. Rennie?

(Mr. Rennie handed Government Exhibit 3-C to Mr. Fast pointing out the statement in question.)

66 Mr. FAST. I am sorry, I never saw this. We don't use this form any more as we will testify, and we haven't used it now for several months.

Assistant SOLICITOR. Well, if it is a part of the charges and—

Mr. FAST. (Interposing) I don't see it in the charges and that's why I objected.

Assistant SOLICITOR. Well, it will be pertinent on the question of the therapeutic value of the preparation sold in connection with the reducing plan. Did the Doctor answer that question?

The WITNESS. I haven't answered it yet.

Assistant SOLICITOR. Well, will you do so please, I overrule the objection to it.

The WITNESS. Will you repeat the question?

Assistant SOLICITOR. The witness requests that you repeat the question, Mr. Rennie.

Mr. RENNIE. Yes, sir. Just one second, sir. The question was whether or not this half teaspoonful of kelp would help turn fat into energy.

The WITNESS. A half teaspoonful of kelp per day will not help turn fat into energy in any way that I know of.

By Mr. RENNIE.

Q. Would the half teaspoonful of kelp per day reduce the hunger associated with a diet sufficiently restricted to permit the reduction of from 3 to 5 pounds per week? Is that question clear?

67 A. Without hunger or without what?

Q. Would the half teaspoonful of kelp per day reduce the hunger associated with a diet providing sufficient calories only to enable a reduction of from 3 to 5 pounds per week; would the taking of kelp have any effect on that hunger?

Mr. FAST. That's two questions in one. I object to it on that ground. I don't object to either question being asked singly but I do object to it as a double-barreled question.

Mr. RENNIE. The question is simply this: Would a half teaspoonful of kelp per day decrease the craving for food that a person on a restricted diet or designed to enable a reduction of from 3 to 5 pounds per week? Do you understand the question, Doctor?

The WITNESS. I am afraid I will have to ask you to repeat the question.

Mr. RENNIE. The question is simply whether or not this half teaspoonful of kelp per day will reduce the hunger of a person who is on a diet rigid enough to permit a reduction of from 3 to 5 pounds per week.

The WITNESS. Well the kelp will not reduce the hunger that a person has from such a restricted diet that's going to make him lose 3 to 5 pounds a week.

By Mr. RENNIE.

Q. Doctor, what is meant by myxedema?

68 A. By myxedema we mean a disease or a diseased state due to deficient function of the thyroid gland; a deficient formation of thyroxin which is the substance formed by the thyroid gland.

Q. Is that the same thing as hypothyroidism?

A. Myxedema and hypothyroidism are synonyms as ordinarily used. Myxedema may refer to a more severe form of hypothyroidism. In other words, some cases of hypothyroidism are not myxedema but all cases of myxedema are severe forms of hypothyroidism.

Q. Do you think that the lack of the thyroid hormone is the sole cause of obesity?

A. No, I do not believe the sole cause of obesity to be a deficient formation of the thyroid hormone. The greatest

cause of obesity or the cause of obesity in practically all cases is eating too much food. Eating more food than a person needs.

Q. Is it possible or probable for a person having myxedema to be normal or subnormal in weight?

A. Yes, that's true. A patient with myxedema may be normal in weight or even subnormal in weight.

Q. If obesity is present in such patients, that is, patients having myxedema, is it due to overeating or to a lack of thyroxin?

A. Still is due to overeating I believe and in practically all cases is due to overeating. Do you want me to enlarge on that just a little bit?

Q. Yes, sir, I wish you would.

A. It has two meanings there, I believe. In myxedema the obesity, if it is really pathological in extent, is due to overeating or eating too much, or eating more
69 food than the patient needs. However, the deficient amount of thyroid hormone, thyroxin, they contribute to that in rare cases to a minor degree, but still by and large I think overeating is the common factor.

Q. Would you say then or would you not say that taking a half teaspoonful of kelp per day would have any effect on the disease, that is, the disease of myxedema, or the obesity associated therewith in those cases where you have an overweight associated with myxedema? Would you like for me to re-state that question?

A. I believe I would like to have you repeat that or re-state it. I think I understand what you mean.

Q. Would taking a half teaspoonful of kelp per day reduce the weight of a patient having myxedema—reduce the excess fat of such a patient?

A. Do you mean alone or with some diet, or what diet?

Q. I was referring to the ability of the kelp itself as a therapeutic agent.

Mr. FAST. I am going to object to it. I don't know whether the witness could answer it or not but nevertheless it is not within the issues of this case.

Mr. RENNIE. If your Honor please, I would like to call your attention again to Exhibit 3-C (Reading):

"Kelp-i-dine is a purely vegetable product. It contains the minerals (including essential iodine) that satisfy hidden hunger, the false hunger that makes people overeat and add weight. It helps turn fat into energy."

Now, that would certainly indicate that this kelp—the

70 iodine in the kelp has ability to do something to the fat, that is, it satisfies hidden hunger that makes people overeat.

Assistant SOLICITOR. Wouldn't your question though be at least less objectionable or perhaps would remove all objection if you merely asked the Doctor what the effect one-half teaspoonful per day would have upon obesity in which myxedema is a contributing factor, or the lone factor, either one?

Mr. FAST. I would like to add to that question, plus the diet.

Assistant SOLICITOR. Well, it isn't necessary to ask plus the diet because he asked what would the effect be, that is, if he were to ask what the effect would be.

Mr. FAST. Then I would not object to the question if he asks the question along the lines indicated by your Honor, but in the manner in which it was asked I think it is objectionable.

Assistant SOLICITOR. Rephrase your question, Mr. Rennie.

Mr. RENNIE. Doctor, can you state the maximum therapeutic effect that might be obtained in the treatment of overweight from the taking of one-half teaspoonful of kelp daily?

The WITNESS. I believe the kelp would not have any effect in reducing obesity in a patient with myxedema.

Mr. RENNIE. Doctor, what is simple colloid goiter?

Mr. FAST. I didn't get the question. Simple what?

Mr. RENNIE. Simple colloid goiter.

71 The WITNESS. Simple colloid goiter is a diseased state where there is enlargement of the thyroid gland, usually obvious on inspection, in which there is an increased amount of colloid which is the material stored in the little spaces that one sees in cutting through the thyroid gland. It may be there is an increased amount of iodine in such a gland or a decreased amount of iodine in varying cases—in different cases. Usually a disease afflicting young women, fourteen to eighteen years of age as a general rule.

By Mr. RENNIE.

Q. What would you say the disease is due to; is it a deficiency disease?

A. It is due to deficient utilization of iodine by the thyroid gland or improper formation of thyroxin or the product of the thyroid gland from the iodine which is available. Usually the disease is more common in communities where iodine is less abundant.

Q. Doctor, are those who have simple goiter generally obese or may they be subnormal in weight or normal in weight?

A. Generally in my experience they have been slightly overweight but not greatly so. Some of them may be underweight. Many of them are within normal ranges of weight for their age and sex, height.

Q. Well, will one-half teaspoonful of kelp daily remove the obesity in such patients, the patients who are overweight?

A. No, it won't remove the—won't affect the obesity in such patients as long as the diet otherwise is not altered.

Q. Is the lack of iodine and other minerals in the diet regardless of the presence or absence of—I would like to restate that question. Is the lack of iodine or other minerals in the diet the sole cause of obesity?

Mr. FAST. It has been stated over and over again if your Honor pleases that obesity comes from overeating. I don't know why we should go over that all the time.

Assistant SOLICITOR. He said there were other factors entering into it. He said by and large overeating was the cause of obesity but there were other factors entering into it. What was the question, Mr. Rennie, repeat it please?

Mr. RENNIE. The question was: Is the lack of iodine or other minerals in the diet the sole cause of obesity?

Assistant SOLICITOR. I think he can answer that question and I so rule, Mr. Fast.

The WITNESS. My answer is no.

Assistant SOLICITOR. His answer was no.

Mr. RENNIE. I didn't hear you, Doctor.

By Mr. RENNIE.

Q. Doctor, is it common for the riddle aged and the aged obese to have diseases of the heart, kidneys and other vital organs?

A. In proportion it is very common.

Q. Would a loss of from 3 to 5 pounds per week be free from harm for such people?

73 Mr. FAST. I object. Even so expert a witness as the Doctor will have to admit there are so many elements that come into the answer to such a question, and I don't think it is fair that the witness should be subjected to questions which definitely indicate that he would have to have had some previous opportunity to examine and check into this type of a question. Everybody knows that people who suffer with heart conditions are—at least I know,

I am suffering with it and I have been told to reduce—almost everybody with a heart condition is told to keep within certain limitations of weight.

ASSISTANT SOLICITOR. I didn't hear the first part of Mr. Rennie's question as to what conditions he was speaking of. If you will repeat that I can rule on it.

MR. RENNIE. Well, the question was, your Honor, would a loss of from 3 to 5 pounds per week be free from harm for such people. The question preceding that was this: Doctor, is it common for the middle aged and aged obese to have diseases of the heart, kidneys and other vital organs? The Doctor said that it was. The next question was: Would a loss of from 3 to 5 pounds per week be free from harm for such people? And that was the question that was objected to. Now, I would like to call the Court's attention to the representations of the respondent, Exhibit 2-A, in which among other things featured prominently he says "Reduce Safely". There is nothing in there to curtail that claim at all. That means safe for everybody. This advertisement is directed to the public generally and would include as members of the public the middle aged and
74 the aged obese who have these heart, kidney and other conditions of the vital organs.

ASSISTANT SOLICITOR. I see your position. Now, what's your reply to that, Mr. Fast?

MR. FAST. There are a great many other elements that are involved before the witness can answer that question intelligently.

ASSISTANT SOLICITOR. For example, Mr. Fast, he has merely asked the question whether someone who is obese who has a heart, or kidney, and some other condition, would be harmed by a reduction in weight of from 3 to 5 pounds a week.

MR. FAST. For how long? In time there would be nothing left of him. I mean, even advertisements have to be read with some degree of logic.

MR. RENNIE. I will re-state that question and say this then: Would a loss of from 3 to 5 pounds per week to a point that the patient obtained a shapely figure be free from harm for such person?

ASSISTANT SOLICITOR. That is, who suffers from heart ailments, kidney and other conditions.

MR. RENNIE. Yes. In other words, Doctor, a fat person having a heart condition would it be safe for that person to lose from 3 to 5 pounds per week over a sufficient period

to enable him or her to obtain a shapely figure—be safe and free from all harm?

75 Assistant SOLICITOR. I rule that he may answer that question.

Mr. FAST. I ask for an exception.

The WITNESS. I believe it would not be safe for any patient with obesity associated with the conditions named as heart disease, kidney disease, and other conditions commonly afflicting the obese middle aged or old person to reduce as much as 3 to 5 pounds per week until he reached a degree of reduction that he had a shapely figure or ideal weight for that person—would not be free from harm in such a patient.

By Mr. RENNIE.

Q. Do you think that unlimited walking would be always desirable for such patients—such people?

A. I am certain that unlimited walking would not be desirable for all such patients, that is, obese patients, middle aged, having heart, kidney or related diseases.

Q. Now, Doctor, I am going to again hand you Dr. Phillips reducing menus, and ask that you examine these menus and estimate if you can the number of calories furnished by such menus.

A. You mean on this 3-C?

Q. Yes.

Assistant SOLICITOR. You can answer separately. If there be a difference between the two, Doctor, 3-C and 3-H, you may answer separately.

76 The WITNESS. First I would like to say that in order to state precisely what the value of these diets would be one would have to use commonly employed tables and charts by which diets are made up. But inspection of this list of foods indicates to me that it is very similar to a low caloric diet—a low caloric diet—somewhere around a thousand or nine hundred caloric diet, twelve hundred possibly, that we serve in hospitals or recommend commonly. As I say, without using tables and actually weighing or having some specification as to the size or weight of these individual portions here it will be impossible to say what the exact caloric value is. My guess would be that from inspection here it is a relatively low caloric diet for any adult.

Assistant SOLICITOR. What's the normal caloric intake today that one should have—normally?

The WITNESS. Well, that question can't be answered the way it is phrased, your Honor, because it varies so much

with individual patients. Generally you might say for the over-all picture of adults in good health, moderate degree of variation from average to normal, somewhere around two thousand to twenty-five hundred calories would be my guess—is the average intake for a normal size person. Now, if you take all the people in that group including the obese probably the average diet which is taken by all adults including the obese would be much more than that, even up to seven or eight or six thousand calories per day.

ASSISTANT SOLICITOR. The reason I asked the question is because you spoke of a thousand calories as being a low calorie diet.

77 By Mr. RENNIE.

Q. Doctor, would you say that following such a diet by the excessively obese would be easily or would be difficult until they got back to a normal weight?

A. It will be difficult for an obese patient to follow this diet. In fact that is the greatest difficulty in treating these patients as they do have difficulty in following such low caloric diets.

Q. Could you enlarge on that a little bit?

Mr. FAST. What does that mean? I object to the question.

Mr. RENNIE. Doctor, would you or would you not say that a considerable portion of the persons starting the following of such a diet would revert to their former eating habits prior to the attaining of a slender figure?

Mr. FAST. I am going to object to that because how can the Doctor say whether anybody would or would not unless he had intimate actual knowledge.

ASSISTANT SOLICITOR. I think a physician can speak of his experience generally with humanity.

Mr. FAST. Well, the experience is that all of us get into trouble because we are careless. We eat too much.

ASSISTANT SOLICITOR. Well, I think the Doctor is in a position to know that we are careless.

Mr. FAST. If it is from a psychological point of view I don't object to it. If it is from a physical point of view I object to it because of the period that this Doctor has any knowledge that will enable him to answer the question. If it is psychologic I would be inclined to agree with him.

78 Mr. RENNIE. Will counsel for the respondent admit on the record that it is natural and normal for people to lapse from the following of this kind of diet?

Mr. FAST. Do people what?

Mr. RENNIE. Will counsel for the respondent admit in the record that it is normal and natural for people generally to overeat and to have difficulty in following this diet?

Mr. FAST. I am not a doctor and I certainly wouldn't make any such acknowledgments. I personally know from experience and I guess all of us do that people are careless. I am not saying it about this particular product. I am talking generally just as I think the Doctor is.

Assistant SOLICITOR. Well, the question is as originally asked is whether one who has started out on a reducing diet is apt to lapse into his former habits after following the diet for awhile. I think that is certainly within a doctor's knowledge, who has any knowledge of the subject of dieting by him.

Mr. FAST. Well, I think that would be so only if the purchaser went back to his old habits because of something which this respondent did. Otherwise I don't think it is evidential.

Assistant SOLICITOR. Well, I don't know upon what representation by the respondent the Government seeks the information.

79 Mr. RENNIE. The question is based, your Honor, upon the representations that this product will assist the person following the diet to maintain the diet. This question is predicated on that premise.

Assistant SOLICITOR. Well, couldn't you ask that direct question, will it assist? I say couldn't you ask that question, will "Kelp-L-Dine" have that effect as represented by the respondent?

Mr. RENNIE. Well, we are getting to that, your Honor. This isn't—

Mr. FAST. (Interposing) Ask him, I won't object to it. Ask him what it has to do—

Assistant SOLICITOR. (Interposing) I sustain the objection to the other question. Proceed to the question of the effect.

By Mr. RENNIE.

Q. Doctor, in your own experience—from your own experience do you find that persons following a low calorie diet, that is, a diet furnishing approximately a thousand calories per day, will experience hunger?

A. Yes, these patients will experience hunger.

Q. Will that hunger properly be called a hidden or false hunger?

A. Well, I think the hunger is very real.

Q. Is heart trouble ever a cause of overweight?

A. Yes.

Q. Would kelp or "Kelp-I-Dine", which contains kelp, remove that cause of overweight?

80 Mr. FAST. I object to that. There is nothing in these pleadings to indicate any such charge that we will do away with the cause of heart condition if they take our product.

Mr. RENNIE. Well, I will re-phrase that question. Will kelp reduce overweight attendant or caused by a heart condition?

Mr. FAST. I object to that for the same reason on the ground that there is nothing in the pleadings that would indicate—

Assistant SOLICITOR. (Interposing) Well, it says regardless of the cause I think here in the pleadings.

Mr. FAST. It says that regardless of the cause we will reduce the weight. That's all it says. It doesn't say we will remove the cause.

Assistant SOLICITOR. The second question he asked, as I understood him, was would it reduce an obesity or overweight caused by a heart condition.

Mr. FAST. I don't object to that.

Assistant SOLICITOR. That was my understanding.

Mr. RENNIE. That was the question, your Honor.

Mr. FAST. If that's the question I don't object to it.

Assistant SOLICITOR. That's the way I understood him.

Mr. FAST. If that's the way the Doctor understands it I don't object to it.

Mr. RENNIE. That's the question, you may answer it.

The WITNESS. Well, kelp or "Kelp-I-Dine" would not reduce the obesity or the accumulation of adipose tissue which a person with heart disease might have. But, if the overweight or the increase in weight were due to an accumulation of water, ordinarily what we call edema, it is conceivable that a slight diuretic action from the minerals in the substance or the laxative action of the substance might cause the patient to pass out more water and so reduce his weight somewhat.

81 By Mr. RENNIE.

Q. Would that reduction be ordinarily replaced by the normal intake of water?

A. Yes, it would.

Q. Doctor, would you say a diet giving a thousand calories per day generally cause a reduction of 3 to 5 pounds

per week in obese persons who are not exercising, including walking, more than they formerly did?

A. I believe such a diet would cause an obese person to lose weight under those circumstances. Whether he would lose actually 3 to 5 pounds every week for an indefinite period of time I can't say but he would certainly lose weight on such a diet. He might lose more or he might lose a little less.

Q. Doctor, are the therapeutic effects of kelp well known to the medical profession generally?

A. I think they are fairly well known generally.

Q. Doctor, in your opinion would any person, regardless of age, sex or condition of health, who follows the Dr. Phillips' or Kelp-I-Dine Reducing Plan will reduce fat and regain a shapely figure easily, quickly, naturally, surely, and without discomfort, exercise, or restriction to any special dietary regimen?

Mr. FAST. Will you repeat that please?

Mr. RENNIE. That question is based on the first charge in the memorandum of charges.

Mr. FAST. Yes, I know. I just want to get—

Mr. RENNIE. (Interposing) Now Doctor, would in your opinion any person, regardless of age, sex or condition of health, who follows the Kelp-I-Dine Reducing Plan reduce fat and regain a shapely figure easily, quickly, naturally, surely, and without discomfort, exercise, or restriction to any special dietary regimen?

The WITNESS. Well, if an obese person followed this diet he would—

Mr. RENNIE. What's that?

The WITNESS. If an obese person follows this diet he will reduce in weight but it will be associated with discomfort—hunger.

By Mr. RENNIE.

Q. Would you say that result would be obtained easily, quickly, naturally and surely without discomfort?

A. No.

Q. Doctor, in your opinion would any person following Dr. Phillip's Kelp-I-Dine Reducing Plan lose 3 to 5 pounds per week and at the same time eat plenty food without the necessity of cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content?

Mr. FAST. Now that I object to because every one of our advertisements says you've got to cut down.

Assistant Solicitor. He hasn't said "cut down",

without cutting down, he says without cutting out those specific foods regardless of caloric content, and he merely asked the question in the form that it is charged in the memorandum of charges. It is a competent question if there is such a representation in the—

Mr. FAST. (Interposing) There isn't any. I don't see any.

Assistant SOLICITOR. In the advertising of the respondent?

Mr. FAST. Yes, that's right.

Assistant SOLICITOR. I don't know whether the term "eat plenty" appears therein. I don't recall that specifically.

Mr. RENNIE. It is in practically all of the advertisements.

Assistant SOLICITOR. But it does state in general terms without cutting out fattening foods.

Mr. FAST. I think your Honor is right. I think that all this ought to be followed up with a question, however if the content is reduced.

Assistant SOLICITOR. Well, I don't think that's necessary. I overrule your objection there because it is following the charge and if the charge follows the representation then it is perfectly—

Mr. FAST. (Interposing) I withdraw the objection. I think your Honor is right.

Assistant SOLICITOR. All right. Let the Doctor answer the question then.

84 The WITNESS. Will you repeat the question, please?

Mr. RENNIE. Would in your opinion any person following Dr. Phillip's Reducing Plan lose from 3 to 5 pounds per week and at the same time eat plenty food without the necessity of cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content?

The WITNESS. Well, the patient would reduce weight if he followed this diet but many of those items of food which you mention do not appear on the diet list that is in this Exhibit 3-C. Therefore, one would presume that they would have to be cut out.

By Mr. RENNIE.

Q. Well now, based on the question as previously stated Doctor, do you think that a person would lose from 3 to 5 pounds per week without cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content?

A. Well, if he ate all of those things regardless of caloric intake he would not lose weight.

Assistant SOLICITOR. Could he eat plenty of them, Doctor?

The WITNESS. If he ate plenty of them to satisfy his appetite, his original appetite, he would maintain his weight or even gain weight. In other words, if he ate as he usually did he would continue to gain weight or maintain his obesity. He would not reduce in weight.

By Mr. RENNIE.

Q. Now Doctor, would in your opinion any person
85 following the Kelp-I-Dine Plan as directed lose weight quickly, easily, safely, and regain a shapely figure without experiencing hunger?

A. No, he would not lose what weight he lost without experiencing hunger, and in my opinion it wouldn't be done safely or easily.

Q. Doctor, in your opinion would Kelp-I-Dine, which is kelp,—Just a minute, I will re-phrase that question. Would you say that kelp contains minerals that satisfy hidden hunger or false hunger that makes people overeat and add weight?

A. No, it doesn't contain anything that will satisfy this hunger.

Q. Doctor, is your testimony here today consistent with the consensus of modern medical opinion, if you know?

Mr. FAST. Oh, I object to that.

Mr. RENNIE. I think that's a proper question, your Honor.

Assistant SOLICITOR. Ask if his opinion is based on modern scientific thought. I think that would be a better question.

Mr. RENNIE. Doctor, is your—

A sistant SOLICITOR. (Interposing) In other words, up-to-date thought.

Mr. RENNIE. Yes, sir. Doctor, is your testimony here today based on modern up-to-date scientific thought?

The WITNESS. It is, to the best of my ability, knowledge and training.

Mr. RENNIE. Thank you Doctor.

86 Assistant SOLICITOR. May I, before you start, ask him one question, Mr. Fast?

Mr. FAST. Surely.

By the SOLICITOR.

Q. Doctor, in giving your testimony did you know of the analysis made by Mr. Frank Casey in this matter when you told of the effects of iodine?

A. Yes, I had seen something about that.

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Q. That is the iodine content of this kelp as analyzed by him?

A. Yes.

Q. You had seen his analysis?

A. Yes.

Cross Examination.

Mr. FAST. What is that analysis, Doctor?

The WITNESS. Well, the analysis, as I recall it, was that there was a small amount of iodine. I think it was about one tenth per cent.

Mr. FAST. One tenth of one per cent?

The WITNESS. Something like that.

Mr. FAST. In how much?

The WITNESS. In any amount.

Mr. FAST. Well, say in a half level teaspoon what would the percentage be or what would the number of milligrams be, or the number of grams?

87 The WITNESS. Well, a teaspoonful would be about 4 grams, half of that would be 2 grams. Tenth of one per cent, that's the figure I recall, would be—

Mr. FAST. (Interposing) Well, you yourself Doctor—

The WITNESS. —about—

Mr. FAST. About 2 grams?

The WITNESS. I believe tenth of one per cent of two grams.

Mr. FAST. Well, in this case he testified that on the basis of a half level teaspoonful it would be .1906 grams. Is that about right?

The WITNESS. Point one—

Mr. FAST. .1906 grams.

The WITNESS. That's almost .2. Yes, that's about a tenth of one per cent of 2 grams.

Mr. FAST. Now when for the first time, Doctor, did you see Dr. Phillips' menu?

The WITNESS. You mean this menu here?

Mr. FAST. No, this one here, referring to 3-H.

The WITNESS. This is the first time I have seen this form here. I have seen a typed copy which, according to my memory, is essentially the same.

Mr. FAST. Do you have it here?

The WITNESS. No.

Mr. FAST. Your testimony is based on recollection of what was in the other menu?

The WITNESS. Recollection plus inspection of this that you and the—

88 Mr. FAST. (Interposing) Well, I move now that all testimony given by the Doctor with reference to Dr. Phillips' menu or diet be struck and deleted from the record on the ground that the witness does not have with him his reports of his investigation.

Mr. RENNIE. If your Honor please, the testimony was given with the menus in the Doctor's possession. The exhibits filed in this case were exhibited to the Doctor, his opinions were based on that exhibit, not some previous investigation.

Assistant SOLICITOR. He had it right in front of him and examined it and as I recall we went off the record to give him opportunity to examine it. He then gave his testimony as based on it. He has not to my recollection mentioned until this moment that he ever saw a copy of that before.

Mr. FAST. Well, it certainly wouldn't be expected that this witness would be called without his having made some investigation, some examination, of that about which he was going to testify.

Assistant SOLICITOR. Well, the only thing you have asked him about is that particular diet in Government Exhibit 3-H and he said he had delivered to him prior to the hearing for examination what he believed was a typewritten copy of that, and while he wouldn't state that it was exactly the same from memory he believed that it was the same, as I gathered from his statement.

Mr. FAST. That's right. That's what he said.

Assistant SOLICITOR. I don't see that is any basis whatever for striking his testimony because he testified from the original there.

89 Mr. FAST. I ask your Honor to grant me an exception.

Mr. FAST. What did you do with the Dr. Phillips' Plan which was turned over to you and from which you made your observations?

Mr. RENNIE. I object to that question, your Honor. That's not material what he did with it.

Assistant SOLICITOR. What did you do with the copy of that, Doctor? Do you know?

The WITNESS. I think Dr. Norris or the lawyer have it.

Assistant SOLICITOR. You gave it back to them you mean?

The WITNESS. Yes.

Mr. FAST. From whom did you get it originally?

The WITNESS. Dr. Norris.

By Mr. FAST.

Q. Doctor, do you know anything about Steadman's Practical Medical Dictionary, published in 1942, by Dr. Garber of the University of Cincinnati College of Medicine?

A. The question is do I know anything about it? Well, it's my memory that there is a book by Steadman entitled something like that, a medical dictionary.

Q. What is its reputation as to reliability?

A. It is a commonly used medical dictionary.

Q. Do you know what other names kelp goes by other than kelp?

90 A. No.

Q. Did you say no?

A. You mean Kelp-I-Dine?

Q. No, kelp, k e l p.

A. I think it is oftentimes referred to as sea weed.

Q. It isn't the usual sea weed that you find around these parts, is it?

A. I don't know.

Q. Don't you know what kelp is made of?

A. I don't know whether it is usual around these parts.

Q. Well, isn't it a fact that kelp comes only from the ocean?

A. As far as I know, yes.

Q. Only from the ocean, is that right?

A. As far as I know.

Q. Do you know its medical term?

A. Kelp.

Q. Have you ever seen the word kelp in any medical dictionary?

A. No.

Q. Or medical textbook?

A. Yes, I think I have.

Q. Where?

A. I couldn't cite you the exact textbook or which one I have seen it in.

Q. Have you ever heard of the word fucus f u c u s?

91 Did you answer the question, Doctor?

A. What is the question?

Q. Did you ever hear of the word fucus f u c u s?

A. I don't recall the term.

Q. Did you make any study about kelp prior to your testifying here today?

A. I made some study of it.

Q. What study did you make of it?

A. I attempted to look up a little bit about it and asked some people about it.

Q. Where did you look, Doctor?

A. In the encyclopedia of medicines and some of the text-books that we have.

Q. In what encyclopedia did you find the word kelp?

A. I didn't find it.

Q. You didn't find it?

A. No.

Q. You were here this morning weren't you?

A. No.

Q. While the chemist testified?

A. No.

Q. Well, what did you study before you came here to testify against this man?

A. Well, I have studied the subject of obesity for a long time.

Q. Obesity yes, but I am talking about kelp.

A. What is the question?

92 Q. My question is: What preparation did you make prior to your testifying here today about kelp?

A. Well, my preparation is my experience and training in internal medicine.

Q. Did you ever have any experience with kelp in your internal medicine?

A. No, I have not used it.

Q. You don't use it?

A. No.

Q. Do you know whether it is used by other doctors?

A. I don't know of any doctor that has used it.

Q. Did you ever hear of a man by the name of Dr. Morris Fishbein?

A. Yes, indeed.

Q. Who is he?

A. He is editor of the Journal of the American Medical Association.

Q. Pretty well regarded is he amongst the medical profession?

A. He holds a high rank or a rank of high responsibility in the American Medical Association.

Q. How do you regard him?

A. I think he is an excellent editor.

Q. Excellent editor.

A. Of the Journal.

Q. And you know too, don't you, that he assisted in editing the American Illustrated Dictionary—Pardon

93 me, the American Illustrated Medical Dictionary by Dorland?

A. I couldn't say whether he assisted in that or not.

Q. Did you ever see that dictionary?

A. Yes, I have a copy of a former edition but I couldn't say whether Dr. Fishbein helped edit it or not.

Q. Well, I direct your attention to the preface—

Mr. RENNIE. I object to that, your Honor.

Mr. FAST. I looked at the law before I came here and you will find that I do have that right.

Assistant SOLICITOR. The right to what; state the proposition of the law, Mr. Fast.

Mr. FAST. I have the right to interrogate one who offers himself as an authority, to question him with regard to standard works. My authority is Corpus Juris; page 575, 32 Corpus Juris, Secundum, in the case of Banko de Senoia v. Bankers Mutual Insurance Company, 95 Northwestern, page 232. This man holds himself out as an expert witness and I have a right to question him about standard works in the field about which he is testifying.

Assistant SOLICITOR. And do you go further and claim the right to contradict him by those standard works?

Mr. FAST. Yes, I do.

Assistant SOLICITOR. You will find two lines of authority in the second Corpus Juris, the note referred to therein, and I have always followed the other rule because of the fact that if you permitted extensive quotations from
94 standard works you could bring the whole Congressional Library of medicine over here and lay it on the desk and there wouldn't be any benefit whatever of cross examination of any of those authors.

Mr. FAST. Well, I submit, if your Honor please, that this man's vested rights are involved. Here's a man who testifies. I am trying to find out what he did by way of investigation and I can't seem to be able to get anything that would indicate that the man even knows about kelp.

Assistant SOLICITOR. Can't a doctor testify from his general knowledge and information which he has acquired over the years without going to the library and reading and making special preparation to answer medical questions.

Mr. FAST. This witness has testified that he had never used kelp.

Assistant SOLICITOR. Well, he testified that kelp was a well known preparation, well known to the medical profession, and that its therapeutic effects were well known to the

profession as well. Now, he has professed no ignorance of the value of kelp in treatment of obesity cases.

Mr. FAST. Well, Doctor—I am still pressing my point and if your Honor rules adversely I shall ask your Honor to grant me an exception.

Assistant SOLICITOR. Understand now Mr. Fast that—I want you to understand—you have got the same right that the Government has to put expert medical testimony—

95 Mr. FAST. (Interposing) I am going to put it on but I also should have a right to try to break down the Government's expert testimony.

Assistant SOLICITOR. Not by contradicting him with medical books where there is no opportunity to cross examine and you will find that position is sustained by many fine courts in this nation. I personally think it is the better rule. It's the rule followed in the state where I practiced law for 25 years and I just can't get away from it.

Mr. FAST. I ask your Honor to grant me an exception.

By Mr. FAST.

Q. Let me ask you this question: Have you ever heard of the word "fucus"?

A. I can't say whether I have heard the word or not. I don't recall the word at the moment in any connection.

Q. You know, don't you, that "fucus" is a synonym for the word "kelp"?

A. It may be.

Q. Now, I am going to ask you again to tell us what preparation you made for testifying as an expert today especially in view of the fact that you did tell us that you had never used kelp.

A. Well, I would say that the preparation I made consisted of acquiring the experience and so on which I listed earlier, interning in hospitals, teaching in medical schools, and practicing medicine.

96 Q. When was the last time that you had ever in your personal experience or in studying come across the efficiency of kelp?

A. The last time?

Q. Yes.

A. I don't understand your question.

Q. Well, I am trying to find out what you know about kelp and I am trying to find out when was the last time you ever thought about it, or worked on it, or had any experience with it.

A. The last time was just the last few days since I had been asked to come down here.

Q. Well, what did you do in trying to study the efficiency of kelp?

A. I didn't do anything in the way of testing kelp. I said I haven't used it. I haven't seen any indication for using it in my work with patients so I haven't used it.

Q. Would the very fact that you personally don't use it mean that other doctors do or do not use it?

A. The fact that I do not use it does not mean that other doctors might not.

Q. Doctor, don't you know that fucus, which is a synonym for kelp, is used in curing obesity?

A. Will you repeat that, please.

Q. Do you not know that fucus, which is a synonym for kelp, is used in the cure for obesity? And I am reading from—

97 Assistant SOLICITOR. I am going to object myself. You cannot state what you are reading from and getting it into the record there. I ruled that you cannot do that.

Mr. FAST. But I may read the words.

Assistant SOLICITOR. You may read the words and refer to it as being read.

By Mr. FAST.

Q. May I ask you this, sir, whether "fucus", which is a synonym for kelp, is used as a cure for obesity?

A. I have not seen any patient cured of obesity by using this fucus.

Q. You personally don't use it, do you?

A. Nor have I seen it used to cure obesity.

Q. If leading physicians have stated in treatises that they have used kelp (they call it fucus) in the treatment of obesity would you change your opinion, referring to men like Dr. Fishbein, Dr. Garber—

Mr. RENNIE. I object to that, your Honor. That's a hypothetical question without a proper foundation. There is no basis for that question.

Assistant SOLICITOR. I think he would have the right to ask him if he knew of cases where other able doctors have cured obesity with kelp. I think that would be a competent question. Whether it would change his opinion if he knew that other doctors had used it. That's a competent question.

98 The WITNESS. In order to change my opinion regarding the value of kelp—

Mr. FAST. What's that?

THE WITNESS. In order to make me change my opinion about the value of using this or any other drug or method of treatment I would not only want a statement of another physician no matter how distinguished, but I would want to critically and carefully see the results of his treatment.

MR. FAST. Well, how much time do you think you would need, Doctor, if I gave you these articles to study so that you would be enabled to say whether or not you would change your mind.

MR. RENNIE. I object.

ASSISTANT SOLICITOR. I don't think he said, Mr. Fast, that the articles themselves would change his mind. He said he would have to make further investigation or examination of the subject, as I understood him, of their treatment.

MR. FAST. Well Doctor, do you think it is fair then to make the statements which you made without having made a more thorough study of kelp?

MR. RENNIE. I object to that, your Honor. That's a matter for the court to pass on, the fairness or unfairness of this witness.

ASSISTANT SOLICITOR. The Doctor is here to give expert opinion not an opinion as to the fairness of his testimony or the accuracy of his testimony. He stated what he believes and what his opinion is but whether his opinion is fair—if he were the only one who had that opinion he might still consider it fair, Mr. Fast, if he has that opinion.

99 **MR. FAST.** I think the Doctor is broad minded enough to change his opinion if he thinks he is wrong. That's the chances I would take on this doctor.

MR. RENNIE. That's still a matter for the court.

ASSISTANT SOLICITOR. Before anybody could make him change his opinion he would have to be thoroughly convinced by more than the article as I understood him.

MR. FAST. Well, would statements in medical books indicating the dosage of kelp in curing obesity mean anything to you if you examined them and checked them? And I am talking of approved dosages in Steadman's and in Dorland's, the preface to Dorland's indicating that Dr. Fishbein was one of those who assisted in the preparation of the book.

THE WITNESS. I am sorry but your question is not clear to me as to what you mean when you ask me if it would mean anything.

MR. FAST. Well, would you still say that your testimony with regard to kelp given here today would be the same

even after you had examined medical books showing dosages for kelp in the treatment and cure of obesity? Also Merck's.

The WITNESS. I still don't understand the question clearly enough to give an answer to the question.

Mr. FAST. In other words, even though you had an opportunity to examine books—acknowledged medical authorities—such as Dorland's, Steadman, and Fishbein, and Merck's, which books speak of the dosage of kelp—

100 Mr. RENNIE. (Interposing) If your Honor please, I object to—

Mr. FAST. Please let me finish.

Assistant SOLICITOR. Let him finish his question.

Mr. FAST. —of kelp in the treatment and cure of obesity, would you still feel that you are right?

The WITNESS. I still can't—

Mr. RENNIE. (Interposing) Would you mind re-stating the question—

The WITNESS. —answer the—

Mr. RENNIE. —I don't understand it myself.

The WITNESS. I can't seem to understand the meaning of the question.

Mr. FAST. Well, let me ask you the question in this fashion. You remember your testimony today, don't you? What's the answer?

The WITNESS. Whether I remember my testimony?

Mr. FAST. Your testimony given here today.

The WITNESS. I remember giving my testimony, yes.

Mr. FAST. I know you gave testimony. I am trying to find out whether you remember the testimony which you gave here today. I want to find out whether your testimony would be the same even after you had an opportunity to examine the standard medical dictionary by Steadman and the American Illustrated Medical Dictionary by Dorland, the preface to which shows that Fishbein assisted in its preparation, and Merck's with regard to the dosage
101 used in the treatment and cure of obesity; whether you think your testimony would stand after making the examination of those three treatises.

The WITNESS. I don't know of anything that would cause me to change my testimony except, as I said awhile ago, a careful examination of the scientific experiments which would have to be performed by reputable scientists and physicians under carefully controlled conditions. I would require information of such experiments and interpretation of those experiments as indicating the value of this or

any other substance before I would attempt to use the drug as a routine procedure or to recommend its use.

By Mr. Fast.

Q. You personally never used it, did you, kelp?

A. I have not used it.

Q. Why not? The question is, why not?

A. Because in my opinion the treatment of obesity or patients with obesity is a condition which can be controlled by careful regulation of the diet, instruction of the patient in the proper diet, and frequent interviews with the patient and re-examinations to find out how he is progressing in following the advised treatment, and I believe that such a substance as kelp is not needed to reduce the weight of an obese patient.

Q. Will kelp help in an obese patient?

A. I think it will not.

Q. How do you know that, Doctor?

A. On the basis of my experience that with a
102 patient who will follow the diet as advised for reduction of his weight--

Q. (Interposing) You have never tried kelp though, have you?

A. I have not tried kelp.

Q. So you don't know what effect it would have on an obese person, would you?

A. As I have said, the fact that patients with obesity do reduce their weight, get along well, if they will follow the diet. The difficulty is that they won't follow the diet.

Q. Well, that's true even when people come to see you isn't it, that they won't follow diets?

A. Many of them won't.

Q. That's right. Now assuming that a person will follow the diet given by Dr. Phillips and Kelp-I-Dine in the dosage which he recommends, would such person get thinner?

A. If he follows this low caloric diet I think the patient will get thinner.

Q. And should get thinner to what extent, Doctor?

A. That could not be predicted I would say. It would vary with different patients.

Q. That's right. Then it would be possible, would it not, for such an individual to reduce to the extent of 3, 4 or 5 pounds per week; is that right?

A. I couldn't say whether it would be possible in every case, it might in some.

103 Q. Not in every case in most cases?

A. I couldn't say they would reduce that much in every case, but—

Q. (Interposing) I didn't say in every case but in cases.

A. —most of the patients with obesity probably would—or I would not like to see a patient lose so much weight as that every week, as a weekly average even. It would probably be harmful to him if he lost that much weight.

Q. Is it a fact that in every one of these cases where there are these reductions that it would be harmful?

A. What is that?

Q. I will put it this way: If a patient weighed 300 pounds and followed the diet which is sold by the respondent here—followed the diet with kelp and Dr. Phillip's diet—and if he lost 3 to 5 pounds a week would that hurt him?

A. In some cases it might be harmful.

Q. Well, in the usual case would it?

A. For how long a period of time?

Q. Well, let's say for a month.

A. That would be a loss of 12 to 16 pounds let us say a month.

Q. About 12 pounds a month.

A. In one month?

Q. Yes.

A. In a 300-pound patient, probably that would not be harmful, in most of such patients, but if continued longer in some of these patients it might be harmful.

104 Q. Well, you don't know of any case where a patient took kelp and a diet similar to Dr. Phillips' that the patient was injured to any extent, do you?

A. I don't understand that question clearly.

Q. I want to find out whether in your experience you have ever heard of a case where a patient took kelp to the extent as recommended by Dr. Phillips and a menu or diet somewhat similar to Dr. Phillips' where such person had any ill effects.

A. I can't say that I know of any given patient who has followed this diet plus the kelp who has gotten into difficulties as a result of it, but I do know of patients who losing that much weight have had difficulties in following a diet.

Q. Well, that situation was true in a case of recommendation made by a medical doctor. Is that right?

A. I wouldn't say that.

Q. What cases do you know where a man lost consider-

able weight, say from 3 to 5 pounds a week, and he was injured as a result of the loss of that poundage?

A. The patients who of their own volition went on a low caloric diet.

Q. From your experience as a doctor would you say that it is wrong for a man, for example, with a heart or a kidney ailment to reduce when he is overweight?

104a Mr. RENNIE. Just one minute please. Would you mind moving back a little bit from the microphone, I can't hear you very well.

Mr. FAST. Oh, excuse me.

By Mr. FAST.

Q. Isn't it a fact, Doctor, that you yourself prescribe for men with heart and kidney ailments so that they should reduce when they are overweight?

A. In some cases we advise such patients to reduce.

Q. Well, when don't you?

A. When we think they may have a tendency to what we call uremia—by that we mean retention of nitrogen products in the blood—which is related to many forms of kidney disease or heart disease as one example, or in patients whom we suspect may have a latent or actual diabetes, or in patients who have coronary artery disease, diseases of the coronary arteries, or who are on the border of what we call heart failure, by which I mean state wherein the heart of the patient is unable to carry the burden of work put upon it. In all such cases we are very careful in advising the patient about losing weight, whether he should lose weight and, if so, how he should do it. We believe he should be under very close medical supervision when he attempts to lose weight even though we may recognize that it is desirable. Put it this way, even if we know that he would be better off if he wasn't so heavy or so fat.

105 Q. You take the position I take, Doctor, that it is better for a patient to get medical examination and treatment rather than to follow ads indiscriminately?

A. I believe it is to the patient's best interests that he have competent, careful and repeated observations by a competent physician; any program of treating his physical ailments.

Q. Well, by and large it is the sensible thing, isn't it, for a person to keep his weight down as long as he isn't underweight?

A. Yes, I think that's sensible or it is common sense.

Q. Now, I think you testified on direct examination that the usual cause for overweight is eating too much. Wouldn't you say that the natural concomitant is that a person who wants to reduce should eat less?

A. It is true that a person who is going to reduce will have to eat less.

Q. Now, Doctor, what is the caloric content of Dr. Phillips' menu?

A. Which one is that, 3-C?

Q. That's right. No, no—

Assistant SOLICITOR. 3-H.

Mr. FAST. 3-H. yes.

The WITNESS. Well, as I said before, this would have to be—in order to answer that question precisely one would have to take this list of foods—and not only the list but
106 have a statement as to the volume or the actual weight of each portion—and take such data and with the use of proper tables calculate the caloric value of each one of these items of a specific volume—specific amount.

By Mr. FAST.

Q. Before you came here you had that list, didn't you?

A. I saw a typed list somewhat similar to this.

Q. Would you say it was the same list?

A. To the best of my memory it is essentially the same.

Q. Now, when you examined it didn't you examine it for the purpose of determining the extent of the caloric weight of the diet?

A. Well, I thought about doing it but it would be impossible really to say exactly what the caloric content of this diet is because the volume or the size of each portion is not stated.

Q. Doctor, when you give a patient a diet list isn't it a fact that you you give it in the same form without saying the size of the piece of bread or the size of the banana? You give it in exactly the same form, don't you?

A. Ordinarily we try to give an indication of the size of the portions.

Q. You say you do?

A. Yes.

Q. You know do you not that is not the usual practice in your profession?

A. I think it is the usual practice among men who
107 are trying to give detailed instructions as to diet.

Q. Well, Doctor, couldn't you determine what the caloric value of Dr. Phillips' reducing plan is on the usual size—

A. (Interposing) Well, by comparing it with lists of diets which we have I would say that this diet is somewhere around eleven hundred or twelve hundred calories. That is my estimate of this diet using as a basis say average size portions of each one of these foods listed here.

Q. Well, if you will look at the plan you will find, will you not, that each one is pretty specifically mentioned, black coffee or tea with lemon, orange or half a grapefruit, slice of toast, egg (boiled or poached), and half a teaspoonful of Kelp-I-Dine; that's pretty specific, isn't it?

A. Using those as average size—Ordinarily in making up diets for patients and also lists which we use in hospitals, in practice, attempt to give a measure say of the size of the toast or the thickness of it, the size of the glass or cup because we know that such things vary a great deal in different households and in different people's opinions. Or even go so far as to say one large or one small egg. Now, in the list of foods over here on the opposite side of this page, which presumably is a list of alternate foods, foods which may be taken in place of some of the foods in the list, there is even a greater variation in the—

Q. (Interposing) Now, show me where, Doctor? Show me where there is a greater variation?

108 A. There is a greater variation in the caloric value but not in sizes. If you take this list of food over on this side of the page—

Q. (Interposing) You are referring to the right side of the page, I take it?

A. The right side of the page where there is a rather long list of foods which may be taken in place of some of the foods on the other list,—the diet is subject to even more variation than it would be if you just followed this list here (left side) as far as its caloric value is concerned, which was your question.

Q. Would a person taking Kelp-I-Dine to the extent of one-half teaspoon per day and Phillips' diet—both on the left side and on the right side—be injurious to such taker?

A. Will you repeat that please?

Q. Would a person taking Kelp-I-Dine to the extent of a half teaspoonful per day and Dr. Phillips' Kelpidine Reducing Plan—both on the left side and with variations on the right side—be apt to injure his health by taking it?

Mr. RENNIE. I object to that question, your Honor. The plan itself calls for exercise in addition to the diet.

Assistant SOLICITOR. I don't see how that would make the question incompetent though. There is a representation in

the advertising that it may be taken safely, and he can ask the Doctor whether taking that diet or taking that kelp will be injurious. I believe that's your question.

109 Mr. FAST. That's my question, yes, sir.

Assistant SOLICITOR. Let the Doctor answer, I overrule the objection.

The WITNESS. Now, which diet are you referring to?

Mr. FAST. The one you have in your left hand, 3-H.

The WITNESS. In some patients with obesity particularly if complicated by diabetes or other diseases, such as heart disease or kidney diseases, the taking of such a diet as this with or without Kelp-I-Dine might be harmful.

By Mr. FAST.

Q. What food for example in that diet would be harmful to such person and in what cases?

A. Well, the most harmful aspect of it would be the reduction of weight in such patients and the sedentary effects of following such a low caloric diet would be a reduction in weight and formation of improperly metabolized substances in the blood stream which might be harmful in some patients, particularly those of the three groups that I have just mentioned.

Q. See if you can't remember my question and answer it. My question, Doctor, is what in that diet would be injurious to a person and what items therein would be injurious who is reducing his weight?

A. Well, the harmful effect, I wouldn't say that in every patient reducing or following such a reducing diet as this would be harmed by any one of these particular lists
110 of foods here. However, the reduction in caloric intake might be harmful to patients, particularly those having diabetes, uremia, kidney diseases, and heart disease.

Q. You mean that would be true if they lost weight from any cause, is that it?

A. That is true. That might be true whether they lost weight from any cause.

Q. But the diet and Kelp-I-Dine as outlined in that exhibit which you are not now examining is not in itself injurious except in the cases that you have just outlined; is that right?

A. Well, there might be other conditions too where it would be harmful, possibly.

Q. Where?

A. Some of these foods, as a tangible example, might be harmful of themselves, in—

Q. Which ones?

A. —patients let us say with diabetes—

Q. (Interposing) You stated that before, Doctor. I am trying to find what other cases.

A. —they are a real hazard.

Q. I am trying to find out in what other cases they would be harmful.

A. Well, it might be harmful in patients with limited kidney function from any one of many causes with a tendency to uremia, or in patients with heart failure, and I think in patients with gout.

111 Q. You don't mean this diet itself, do you? You mean general loss of weight under any circumstances might be detrimental in the cases which you mentioned; is that right? In itself it is not an injurious diet, is it?

A. Under what conditions and in what patients?

Q. The average patient who is fat and wants to reduce.

A. Well, the point I would like to make is that in some patients following this diet might be harmful to them.

Q. What patients?

A. Most common group of such patients where a hazard would be commonly recognized by medical people or by myself.

Q. You mean heart and—

A. (Interposing) Would be those that I have mentioned. They are most common ones.

Q. I asked you the question whether in itself the list is an injurious one—whether the diet is an injurious one to a person who wants to reduce and who doesn't have a heart condition, or gout, or a kidney involvement.

A. My answer is that the diet might be harmful to some patients. I can't say that it would not be harmful to what you might think of as an average patient, or anyone else might think of as an average patient.

Q. Well, I am trying to find out from you, Doctor, whether the diet is injurious to a person who doesn't have a heart condition, or a kidney involvement, or gout.

112 A. Well, I think to a patient who is free from disease and wants to reduce that such a diet might be helpful to him and might not be harmful, but that before he goes on or attempts to follow such a diet he should be examined by a competent physician and have his time of treatment observed rather closely by a physician for the detection of any harm that might arise.

Q. You take it that there should be no attempt on the part of anybody to reduce except through the doctor?

A. I believe that would be safest for the patient.

Q. Do you know what an anti-fat is, Doctor?

Mr. RENNIE. Would you repeat that, please, sir?

By Mr. FAST.

Q. Do you know what an anti-fat fat is, Doctor?

A. I don't know of any such word in common usage.

Q. Isn't that in every one of the medical dictionaries...

A. I couldn't say that it is in every one of the medical dictionaries.

Q. You never came across the word "anti-fat," did you?

A. Anti-fat?

Q. Yes.

A. I don't recall having seen such a word.

Q. You still teach, Doctor?

A. Still teach.

Q. Where?

A. I teach at Georgetown and George Washington.

113 Q. In the study of internal medicine you never came across the word "anti-fat"?

A. I don't recall that word.

Q. Don't you know that kelp is designated as one of the anti-fats?

A. I haven't heard it designated as such.

Q. Have you ever had occasion to look it up?

A. Anti-fat?

Q. Yes.

A. No, I haven't had occasion to look up that particular word.

Q. Have you ever had occasion to check as to what anti-fats are?

A. Well, I can presume what the meaning of that word is. The combination of these two, that is, fat plus the prefix anti, means a substance to combat or be against fat.

Q. Did you ever hear of Gould's Medical Dictionary?

A. Gould's?

Q. Yes. Edited by R. J. E. Scott.

A. Edited by who?

Q. R. J. E. Scott. Published by Blakiston.

A. Yes, I believe there is a medical dictionary by that name.

Q. And do you know whether or not that book or any other book designates fucus as an anti-fat?

A. No, I don't know precisely what Gould's Dictionary would say about fucus.

114 Q. You never heard of the word "fucus" before today, did you?

A. I don't recall it. I wouldn't say that I hadn't heard of it.

Q. Doctor, how do you know that Kelp-I-Dine by itself will not reduce an individual?

A. Kelp-I-Dine by itself?

Q. Yes.

A. You mean without any diet?

Q. With a low diet.

A. With a low caloric diet?

Q. Yes, with a low caloric diet.

A. Well, I believe Kelp-I-Dine with a low caloric diet, that is, if it is low enough and the patient follows the low caloric diet such patient will reduce weight.

Q. With any harm to the patient?

A. In many cases it might be harmful to the patient.

Q. In what cases?

A. Patients such as listed before, as those with the metabolic disorders which are very common in obese people, namely, diabetes, uremia, heart disease, high blood pressure, kidney disease, and so on.

Q. You mean to say that a person with high blood pressure should not reduce?

Mr. RENNIE. If your Honor please,—

The WITNESS. I didn't say that.

115 Mr. RENNIE. —this has all been gone over again and again. It seems to me to be repetitious.

Mr. FAST. This is the first time I have used the term high blood pressure or the first time the Doctor ever used it.

Assistant SOLICITOR. Well, I think he had reference to your former question.

The WITNESS. It is a form of heart disease and kidney disease we believe, or it is a disease in which both organs are commonly or seriously damaged, and in such patients following a strict reducing diet, low caloric intake, particularly without careful medical supervision and followup, it might be harmful to that patient.

By Mr. FAST.

Q. Osteopaths don't feel that way, do they?

A. I have never felt an osteopath.

Q. Doctor, what is the average sustaining diet of a person who wants to reduce in weight?

A. Will you re-state the question?

Q. What is the sustaining diet for an average person who wants to reduce? Excuse me, I was wrong. What is the average caloric value of a diet to be used by a person who desires to reduce?

A. Well, that will depend upon the age, height, weight of the patient and his degree of physical activity, the type of work he does.

116 Q. Assuming that a person takes no exercise and wants to reduce, how many calories should he take per day and have enough?

A. One would say that the average—in order to maintain his weight and his strength for an average size adult—let us say 160 pounds or somewhere along there—might be around two thousand, maybe twenty-five hundred, calories. By that I mean a patient or a person following an average degree of exercise. You meant no exercise whatever. You mean he was in bed all the time?

Q. Oh no, he's a lawyer and sits behind his desk. I mean the average person who doesn't do much manual exercise.

A. Well, the average person of that sort, average size, and average degree of activity, will need around twenty-five hundred or two thousand calories to maintain his weight.

Q. Now, Doctor, if a person wants to reduce, remembering that you gave it in testimony before that usually people increase in weight because they are careless about their food and eat too much, isn't the corollary that the person who eats less will get thinner?

A. Eats less than what?

Q. Less than they did before.

A. If he eats enough less than his former diet so that his caloric intake is below the amount needed to maintain him in or at the weight which he has.

117 Q. I don't understand that. I mean, for example, if a person wanted to reduce in weight and up until such time as he or she thought that she weighed sufficiently low and took Phillips diet with Kelp-I-Dine that person would have enough sustenance, wouldn't he or she?

A. I am sorry I didn't get that. It seemed to me you asked two questions.

Q. Well, fat people like to eat too, they are hungry all the time too, aren't they?

A. They eat more than they should and more than the average size person.

Q. Because they feel hungry, is that it?

A. Because they feel hungry, or because of habit, or because of circumstances?

Q. Now, could the average person take Kelp-I-Dine to the extent outlined in Dr. Phillips' Kelp-I-Dine Plan and Dr. Phillips' diet and be able to sustain himself?

A. You mean keep his same weight?

Q. No, no, reduce in weight and have enough food to meet the necessary requirements of his body?

A. Well, in some cases this diet might furnish enough to maintain him.

Q. In what cases would it?

A. I don't understand what you mean by "sustain."

Q. Be harmless to him?

118 A. In many cases following such diet might be harmful.

Q. In what cases?

A. In such cases where the patient loses so much weight that the fats which are being broken down or catabolized, as we say, are not properly oxidized or utilized. In such cases it would be harmful.

Q. Would it make any difference in the giving of your testimony if we showed you say hundreds of—over a thousand—testimonials from users that they have been using Kelp-I-Dine and the Phillips' plan and are feeling very well?

A. In order to make me change or accept any claim that might be made as to the value of this or any other treatment I would want to know the details of carefully controlled scientific experiments or trials under control conditions by competent, scientific, medical authorities, rather than testimonial—

Q. (Interposing) Well, you didn't take any trouble to look up authorities before you came here to find out the value of kelp, did you?

A. I didn't find any authorities.

Q. You looked in the encyclopedia and found kelp is there, didn't you?

A. I didn't find any place where it said that kelp was of value.

Q. What?

A. I hadn't found any place in what reading I have done recently or in my medical experience, nor have I heard any teachers or medical associates say that such a substance was useful.

Q. What encyclopedia do you use, Doctor?

A. I have one called the Encyclopedia of Medicine. It is edited by Piersol P I E R S O L and published by Davis, I believe. Put it this way. What I am trying to say is that before I would urge or recommend any form of treatment I would want to have scientific evidence proving that the drug was of value unless it was being used under my hands as a controlled scientific experiment.

Q. Is kelp a drug?

A. Kelp?

Q. Yes.

A. If it is being used as a form of treatment it would be a drug.

Q. You know it is a vegetable, don't you, Doctor?

A. Many valuable drugs are vegetables if one defines a drug as a substance being used for treatment or to regulate physiological function.

Q. Well, is that the chemically accepted definition of the word "drug"?

A. Yes, I think so. Generally speaking that is the definition of the term "drug." It is the one I would use at the moment. It might be either of a mineral or vegetable origin. It might be synthetic.

Q. What is it, is it synthetic?

120 A. I say a drug might be synthetic.

Q. I am asking you whether Kelp-I-Dine is synthetic?

A. I believe it is not. By synthetic I mean something that is constructed by union of substances.

Q. Well, would you say it is a vegetable?

Dr. NORRIS. (Interposing) Your Honor, I would like to suggest, the witness has been on the stand for three hours, I think we ought to have a little recess.

Assistant SOLICITOR. Do you want a recess, gentlemen?

Mr. FAST. I don't care, it is all right with me.

Assistant SOLICITOR. Well, if you want a short recess, gentlemen, you may take it and then resume.

(Discussion off the record.)

(A recess of one-half hour was taken.)

By Mr. FAST.

Q. Doctor, will you explain generally what is known by the term "metabolism"?

A. "Metabolism" is a term referring to the utilization or absorption of materials taken into or eaten or absorbed in one way or another by the organism, human or other. The mechanism in which those substances are used by the organism. There are two forces to metabolism, the build up of tissue and the breakdown of tissue.

Q. Well, what is the connection between iodine and metabolism and the loss of weight?

121 A. Iodine is necessary for the proper function of the thyroid gland. It must not only be absorbed by the alimentary canal, the blood stream, taken to the

thyroid gland, but must be utilized by the thyroid gland in the proper manner. The second part of your question was what—referring to loss of weight?

Q. Yes. What is the connection between thyroid, metabolism, iodine and loss of weight? I am trying to save time that's why I am putting it that way.

A. As far as I know there is no real direct relationship between iodine and loss of weight. It is an indirect relationship in that the thyroid gland needs iodine for its proper function, and proper function of the thyroid gland is concerned possibly with loss of weight in a very very small percentage of patients. As I mentioned once before here, it is only a very small percentage of patients will dysfunction of the thyroid gland, either increased or decreased function of that gland, in which obesity is a prominent part of the problem.

Q. Will iodine increase metabolism, Doctor?

A. Under what conditions and in what patients; in all patients?

Q. In the average person.

A. I don't think it will play much of a role in the ordinary patient, that is, within the ordinary limits.

Q. How much iodine should a person take a day?

A. An ordinary patient shouldn't take any iodine
122 in addition to the traces which are in the food and water which the ordinary or average patient gets in most parts of this country.

Q. Pardon me, Doctor. When I said iodine I didn't mean that I wanted a person to go to a drug store and buy a bottle of iodine. I mean iodine in some form or other directly or indirectly. How much iodine should a person take per day?

A. I say he doesn't need to take any in addition to the traces of iodine which are in the food and water that he gets except—

Q. (Interposing) That's what I am talking about. How much iodine should he get through those traces?

A. Well, in certain parts of the country where iodine is absent or improper in composition so that it is not utilized by the body properly, such as regions around the Great Lakes, northern part of Texas and northern parts of the Rocky Mountain region, in such locations iodine is absent in proper amounts or in proper form and those patients in those communities—many growing children—need to take

additional iodine. But, on the average the patient doesn't have to take any except what he gets in his ordinary food and water.

Q. How much does he get in ordinary food and water?

A. How much do they get?

Q. Yes. How many milligrams?

A. Oh, I think it is probably expressed in micromilligrams.

Q. How much?

123 A. A micromilligram is a thousandth of a milligram.

Q. Yes, I know that. But, I mean how many milligrams should the average human being need through foods and otherwise every day?

A. The total intake in any of his food?

Q. That's right; expressed in terms of milligrams.

A. To the best of my recollection it's in terms of thousandths of a milligram.

Q. How many thousandths?

A. How many?

Q. Yes.

A. For what period of time? Do you mean every day—

Q. Every day.

A. —once a week, or once a year, or what?

Q. Every day.

A. I think it is around 1 to 5 micrograms which is a thousandths of a milligram.

Q. About 105 you say?

A. 1 to 5.

Q. 1 to 5 milligrams?

A. No, micromilligrams.

Q. And that means how many?

A. Thousandths of a milligram.

Q. Do you know whether or not the Food and Drug Administration has set the normal daily minimum requirement of iodine per person?

124 A. I don't know whether they have set up a statement or an opinion on that. It is a problem of great academic interest. By that I mean there is a great deal of argument on that point as to the form and amount of iodine which is necessary under various conditions. I don't know whether the Food and Drug Administration has a statement on that or not.

Q. Do you know whether an increased metabolism causes a reduction in weight?

A. Increased metabolism greater than that which the individual has when he is obese may cause reduction in weight in some patients:

Q. Isn't it a fact, Doctor, that it's elementary that in the normal case an increased metabolism will always cause a reduction in weight?

A. No, that's not true. If enough food is supplied, even though the metabolism is increased, if the food is taken in to meet the requirements of that increased metabolism there won't be any change in weight.

Q. What if in addition to the usual food and water there is an increased metabolism through extraneous means—

A. Such as?

Q. —what effect would that have on the reduction in weight?

A. Well, if the metabolism is increased and the amount of calories taken in are not increased above the number of calories required to maintain the same weight, 125 then you may have a reduction in weight even though it may be detrimental to the patient.

Q. Maybe I can't get what I am after. Let me put it this way: Kelp-I-Dine contains iodine, does it?

A. Yes.

Q. Would the taking of Kelp-I-Dine increase the metabolism of the average individual?

A. I don't know of any way in which it would.

Q. You mean to tell me, Doctor, that if you took a handful of this Kelp-I-Dine that that wouldn't increase your metabolism?

Mr. MANHERZ. Your Honor, I object to counsel arguing with the witness. He has already answered the question. He said he knew no way in which the taking of Kelp-I-Dine would increase the metabolism, and counsel is just now arguing with the witness and I object to it.

Mr. FAST. I have a right in cross examination—I don't want to argue with the witness—I even have a right to argue with him—I am trying to show the ridiculousness of the answer.

Mr. MANHERZ. Mr. Solicitor, he has already answered his question.

Assistant SOLICITOR. Well, he answered the question perhaps having in mind the dosage that is recommended. He can answer the question about it if he took more than the dosage. Specify your dosage, Mr. Fast.

Mr. FAST. Well, I will say a dosage of a hundred milligrams.

126 The WITNESS. I still don't know of any way in which taking all that would increase the metabolism. Mr. FAST. That's all.

Assistant SOLICITOR. No further cross examination, Mr. Fast?

Mr. FAST. No.

(Whereupon, the hearing adjourned at 5:30 o'clock p. m. on January 10, 1945, to be resumed at 10:30 o'clock a. m. on January 11, 1945.)

126a

Transcript of Proceedings

Before the Solicitor for the Post Office Department
Holding a Fraud Order Hearing

F. & L. Docket 14/303

In the Matter of

AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER;
both at Newark, New Jersey;

AMERICAN INSTITUTE OF FOOD PRODUCTS; WALTER H. EDDY;
WALTER H. EDDY, PH. D.; WALTER H. EDDY, PH. D., President;
DR. WALTER H. EDDY, PH. D.; and ROBERT A. BORIES,
General Manager, all at New York, New York.

Thursday, January 11, 1945,
Washington, D. C.

127 Before the Solicitor for the Post Office
Department

Holding a Fraud Order Hearing

F. & L. Docket 14/303

In the Matter of Charges That

AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER;
both at Newark, New Jersey;

AMERICAN INSTITUTE OF FOOD PRODUCTS; WALTER H. EDDY;
WALTER H. EDDY, PH. D.; WALTER H. EDDY, PH. D., President;
DR. WALTER H. EDDY, PH. D.; and ROBERT A. BORIES,
General Manager, all at New York, New York.

are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended).

Washington, D. C.

Thursday, January 11, 1945.

Hearing of the above-entitled matter was resumed before Honorable Daniel J. Kelly, Assistant Solicitor of the Post

Office Department, in the hearing room of the Post Office Department, on Thursday, January 11, 1945.

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APPEARANCES

On behalf of the Post Office Department: W. V. RENNIE, Esq., RALPH B. MANHERZ, Esq.

On behalf of the respondents: American Health Aids Company and Energy Food Center: LOUIS A. FAST, Esq.

Proceedings

Whereupon,

DR. FRED W. NORRIS called as a witness for and in behalf of the Post Office Department and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. RENNIE.

Q. Dr. Norris I believe that you were sworn yesterday in this proceeding, were you not?

A. Yes.

Q. Will you state your full name and occupation?

A. Dr. Fred W. Norris. I am Senior Medical Officer of the Federal Food and Drug Administration, Federal Security Agency, Washington, D. C. in which capacity I have been employed for the last fifteen years. I was graduated from the University of Texas, following an A. B. degree with a degree of M. D., 1924. I had practically five and one-half years internship, externship, in which I was practicing general practice in hospitals, clinics, and so forth; two years general practice included; after which I came to the Government in 1929 (November) and I have been in this present capacity since.

Q. In addition to your general experience as a doctor of medicine can you tell us anything else of your experience and qualifications with reference to the treatment of the obese?

A. Of course, in medical training we are trained in the preparation of diets for the treatment of persons who are overweight, normal weight and those who are sick and those in which we wish to increase the handling of calories and the training in regard to nutrition. Since coming with the Government--Before that I have treated patients of my own with obesity and a number of people who were overweight with other diseases who needed to reduce as a part of the treatment for the general disease in the hospitals and the clinics and in general practice also. Since I came

to the Government it has been my duty to study the question of obesity, the deposition of fat and methods of removing fat. The question of overweight has come up in my work, I would say fully a score of times each year in which I have had to consult textbooks and modern articles and specialists and pharmacologists in my own department with regards to iodine and kelp and thyroid and other things that have been employed in mail-order preparations and in preparations which have been examined and analyzed by the Food and Drug Administration, including a number of cases involving sea weeds of different kinds, and kelp, a number of devices alleged to remove fat. And I would say in the course of the fifteen years we've had at least ten a year and probably closer to 20 a year in which the question of nutrition and fat removal or fat deposition has come up as a part of the case involved where I had to give opinions as to whether or not the claims were in conformity with medical consensus.

Q. In the course of your professional experience, Doctor, have you had occasion to inquire into the therapeutic value of kelp?

A. Yes, I have. Kelp and other preparations containing iodine and various forms of seaweeds which are classed as kelp, generally, or bladder-wrack or fucus or whatever you want to call it—various forms of seaweeds—chondrus is another type—or Irish moss.

Q. Now, Doctor, you heard the testimony of Mr. Casey yesterday, and I will ask you if you are aware of the chemical analysis he made of the preparation known as "Kelp-Iodine"?

A. Yes, I heard his testimony and statement that this particular preparation contained four-tenths of a milligram per half teaspoonful.

Q. A milligram of what?

A. Of iodine per teaspoonful.

Q. Are you familiar with the properties of the ingredients contained therein?

A. I am familiar with the properties of kelp and of the various ingredients, particularly mineral matter and other factors or ingredients contained in kelp. Yes, I am.

Q. What therapeutic qualities do those ingredients have?

A. In dosages of one-half teaspoonful I think the seaweed is worthless entirely therapeutically, except perhaps as a preventive or as the means of supplying food iodine. It can be used in place of iodide salt to supply iodine if that were lacking, that is, as a preventive for iodine

deficiency. But that is about all I can see that it is useful for. It does have some gummy mucilaginous substance in it that is used for other purposes in considerably larger doses, though.

Q. Are iodine deficiency diseases prevalent in this country?

A. Around the Great Lakes, Wisconsin, Minnesota, parts of Ohio and Illinois—close to the Great Lakes and in certain portions of the Rockies, Montana, Utah—there is a deficiency of iodine in the soil and vegetables raised there and some of the people who live there constantly and do not eat enough iodized salt—or don't use iodized salt—might in the course of years suffer from an iodine deficiency. But in general, throughout the country as a whole, there is no iodine deficiency. The various other parts of the United States get enough iodine in their food stuffs.

Q. Doctor, what is meant by the term "obesity"?

A. Obesity means an excess amount of fat above normal weight limits as set by average tables and standards. Generally more than ten per cent above the standard set.

Q. Is iodine deficiency one of the causes of obesity?

A. No, I don't think so. In my opinion it is not. I say that for various reasons.

Q. Will you state those reasons, please.

A. One reason is that a real state of hypothyroidism which is a failure of the thyroid gland to properly metabolize and supply the iodine to the tissues in the form of thyroxin or the hormone of the thyroid gland—There
132 is not any great state of obesity, generally. And if obesity is present why I feel that it is due to over-eating. Those people may be underweight or normal weight, and some of the overweight that is present in the proportion that is overweight—something like fifty per cent or slightly more—in those cases who are overweight why there is a collection of water under the tissues, a mucoid liquid. Tissues of the face and legs and other parts get puffy and that is not really obesity; it isn't excess fat in those cases; it is a deposit of mucoid liquid. And furthermore, in those cases of animal experimentation we find that where the thyroid gland is removed and there really is an iodine deficiency, the basal metabolic rate is minus forty, and you have compared with normal dogs or normal experimental animals a considerably less degree of fat. And so if we argue by experimentation why we can see that a hypothyroidism causes less fat. And in the simple colloid goiter due to an iodine deficiency there is generally con-

ceded that there is no more obesity present than there is in the general run of the population. There may be some obese people; but if they are obese among those with simple colloid goiter, it is due to overeating.

Q. Do you think that kelp has any valuable therapeutic properties as an adjunct to a low calorie diet?

A. It does not have any therapeutic properties as an adjunct to a low calorie diet in my opinion.

Q. Do you think that kelp will satisfy hunger or craving for food associated with low calorie diets?

A. No, it has no value for such purpose.

133 Q. Dr. Norris; I have here a statement from the advertising literature of the respondent which says that:

Kelp-I-Dine will help give you a feeling of fullness and satisfy the abnormal cravings for food.

What do you think of that statement?

A. I think that statement has no basis of fact whatever for the reason that it may be based upon the idea that the gum present in this kelp will swell or absorb water. It does swell some, but the amount of swelling is inconsequential; a few times more than its original weight or volume and that amount is inconsequential, no value whatever to produce any feeling of fullness. In half teaspoonful dosage it would swell up, for instance, maybe two teaspoonsful of gum. And that at breakfast time with this small diet would be absolutely inconsequential.

Q. Do you think that this kelp will swell approximately as much in water as it would be in the acid condition of the stomach?

A. Well, other gums that we have tested have shown a very small or a much smaller proportion of swelling properties in the presence of stomach acids than it did in tap water.

Q. Doctor, if a person took "Kelp-I-Dine" in conjunction with a low calorie diet, such as Dr. Phillips Reducing Diet, reduced his weight, would you attribute the reduction to the diet or to the "Kelp-I-Dine"?

Mr. FAST. I object to that unless there is also included therein the words "or both", because nowhere in the advertisement does it say which of the two is responsible for the reduction in weight.

134 Assistant SOLICITOR. Well, isn't he entitled though to inquire into the efficacy of each?

Mr. RENNIE. I have no objection to—

Assistant SOLICITOR. (Interposing) Well, if you have no objection, put it that way: "or both".

The WITNESS. I feel that any reduction secured while following the "Kelp-I-Dine Plan" or prescribed measures would be due solely to the lessened dietary intake and would have no effect whatever from the "Kelp-I-Dine". There might be some increased loss if the persons took the advice to walk as much as possible and did walk a considerable number of miles a day, why there might be some reduction due to the increased exercise over that that they formerly employed.

By Mr. RENNIE.

Q. Would, in your opinion, the results be the same with as without the Kelp-I-Dine"?.

A. Yes, the same—exactly the same amount of loss, in my opinion, would occur whether or not "Kelp-I-Dine" is taken.

Q. Doctor, I hand you a copy of Dr. Phillips Reducing Diet, Exhibits 3-C and 3-H, and ask that you discuss these diets in relation to the calories furnished thereby.

A. I took these menus and attempted to estimate what I considered to be an average or approximately an average of the number of calories that would be ordinarily secured by the people if they followed the advice; and I estimated that in this 3-C—the one that is sent following the sale—a person might get 800 calories, or he might get 1000, and he
 F35 could possibly run it up to more than that. - You see, there are same differences here. (Reading from Exhibit 3-C): "Jello, if desired"; and it says "lettuce and cucumber relish with dressing, two-tablespoons". Now, that might be two tablespoonsful of dressing; but if you take it to be two tablespoonsful of the relish, you would have to know what kind of dressing is used. If you are using a mayonnaise or an oily dressing why that would provide more calories than the French dressing. And in this fresh fruit salad, they say "diced banana, 1 plum, $\frac{1}{2}$ tangerine, 1 helping". Well, they don't say how much banana, and they probably wouldn't be able to get banana now, and if they substituted something else, you don't know what it would be. But figuring on the basis of the other and a heap-ing tablespoonful as being a moderate average helping, why you can run these calories somewhere around 800 and 900 or 1000, probably an average of 1000, because the average obese person who is hungry is going to take a little larger helping perhaps than other people would for a helping. So the other

menu, the listed portions and the tabulation of foods in sample menu in the presale literature might furnish 900 or 1000 or 1200; and if they selected the alternate foods in the list, it might run even more than that. For instance, it is suggested that a sandwich of two thinly sliced pieces of bread with one egg for a noon dinner in case of sandwiches —There would be considerable variation here but I would say that either one of the two menus would provide probably 1200 or less calories, and I think as about a minimum might secure 800 or even less if they used small helpings and omitted jello. But I don't think it would go below 800 ordinarily, even in the one sent after sale.

Q. Doctor, would an obese person following either of these diets and taking "Kelp-I-Dine" according to directions lose from three to five pounds of fat per week?

A. On a 900 or 1000 calorie diet persons do not on the average ordinarily lose from three to five pounds a week. They generally have to take a lower calorie diet than that, that is, if they don't increase their exercise. For this reason: In order to lose three pounds you have got to reduce your dietary intake about 1700 calories below what you ordinarily need, and to lose five pounds it is up to around 2700 calories below what you ordinarily need, and most people don't need more than 2700—most of the obese persons; there may be some largely very obese who need more, 3000 even. But without increasing exercise there would be few people lose five pounds a week on a 800 or 900 calorie diet. A 300 to 450 calorie diet is ordinarily required to cause such losses, and some people wouldn't lose that much if they didn't eat anything in a whole week, that is, on the average. And so, as a general rule, while he might lose three pounds in some cases, that wouldn't be the average loss of a 1000 calorie diet, or 900 calorie diet unless exercise is increased. So you wouldn't expect ordinarily to lose four or five pounds, and generally wouldn't lose as much as three pounds even—some would.

Q. Now, Doctor, would the reduction in the fat person at the rate of three to five pounds per week to a normal figure always be safe?

137 A. No, that isn't a safe way to reduction. It is altogether too rapid for some people, and shouldn't be advised for everybody indiscriminately. It may run into a case of acidosis in even a normal person because you have got to use up your fat tissues to supply the energy that you need, and if you don't take enough protein and carbohy-

drates along with it— A ratio of about twice your carbohydrate calories plus one half the protein should prevail as compared with the calories from fat in order to avoid acidosis. And acidosis is more common in those who exercise. For instance, walk as much as possible or take increased walking. You may produce an acidosis by using up your protein tissues and not have a nitrogen balance there. And the harm is more particularly in fat people who have tuberculosis as some fat people do, and not know it in many cases; and the persons with diabetes and cirrhosis of the liver and the common diseases of the heart and arteries and kidneys who are overweight. Sometimes that obesity is associated with excess fluid in the tissues or sort of an edematous or dropsical condition. They don't realize that always. A lot of them have these diseases without knowing it, too. The heart diseases, diabetes and tuberculosis in particular are commonly present without the patient knowing it. And so it is dangerous to prescribe indiscriminately the reducing regimen which would reduce at the rate of three to five pounds a week regularly or even reduce to normal at a lower rate per week. Any dietary regimen losing over two pounds a week is likely to prove dangerous and even in some cases two pounds or one pound wouldn't be advisable. You have to take each patient as an individual.

138 Q. Doctor, you mentioned acidosis. For the record will you explain just what is meant by that term?

A. Acidosis is a condition in obesity, diabetes and other diseases associated with the collection in the fluids of the body of certain acids called acetone bodies. It is diacetic acid and other acids where are produced by the incomplete combustion of facts, and if the body hasn't enough glucose present why such incomplete combustion products occur. The glucose from sugar or glucose from proteins—half of the protein is turned into glucose by the body's metabolism—so if they have enough glucose present why acidosis doesn't occur as a result of burning up the fat or of eating too much fat. It is also called ketosis.

Q. Would kelp iodine have any effect on acidosis?

A. No.

Q. Would "Kelp-I-Dine" help to turn that excess fat into energy or help the metabolism?

A. "Kelp-I-Dine" has no property whatever of turning excess fat into the foods or excess fats from deposits already present in the body into energy.

Q. Now, Doctor, referring again to Exhibit 3-C—

A. (Interposing) I would like to elaborate on that last question, because I feel that the vast majority of the people in this country have no iodine deficiency whether they are obese or not; and taking hypothyroidism in which there is an iodine deficiency, that is, there is not enough iodine being properly metabolized to supply the hormone needed from the thyroid, only about one case out of a thousand of obese people over the country would have hypothyroidism, in my opinion.

139 Q. Doctor, referring again to Exhibits 3-C and 3-H, I ask you: Would an obese person following such a diet for an extended period of time, that is, a period sufficient to reduce his or her weight to normal, experience hunger?

A. During the process of following a 1000 calorie or 800 or 1200 calorie diet regardless of what foods are used, there would ordinarily and quite generally be an increased appetite hunger or craving or desire for foods above that of a person on a normal diet.

Q. Would such hunger be properly designated or called "hidden" or "false"?

A. No, I think it is a real proposition that persons who take as low as 1000 calories a day are going to be regularly hungry throughout the day and much more so than—I might say that obese persons eating as they generally do don't allow hunger to occur as they follow their appetite and eat before they get hungry ordinarily. They eat between meals and their meals are so spaced that hunger doesn't have time to really occur. They eat just through force of habit or from their appetite largely. That is very common among the obese, and they find that they eat many more calories than they need—several hundred as a rule.

Q. Doctor, would you say that it would or would not be easy for an obese person to follow either one of these diets and take "Ke'p-I-Dine" as directed over a period sufficient to reduce his or her weight to normal?

A. I think it is improper and false to state that obese persons who are chronically obese or excessively
140 obese—those that have to continue the process over the course of a number of weeks or months to get to normal weight—I think it is false to say that they will find reducing an easy process because of the fact, as is well-known, that a large proportion of the people get so hungry and suffer from the discomfort from such reducing regimen to the point that they go back to their former dietary practices before they get to normal weight. A large percentage

who start is likely to revert to former practices even before they reach their normal weight. And after they reach their normal weight a very large proportion go back again and become fat soon. Because the same causes of obesity are present and these are behavioristic in many cases due to habits and conditioned reflexes, and so forth, persons are likely to become obese again even if they reduce once or several times. A large proportion attempting to reduce never reach normal because it isn't easy.

Q. Doctor, would the hunger attendant the following of such a diet be due to a lack of minerals in the diet or to a lack of calories?

A. There is no basis that I know—a scientific basis for belief—that lack of any mineral is a common cause of obesity or is a cause of obesity; and in fact those who suffer from mineral deficiency diseases that are recognized might be of normal weight or underweight. And certainly, there is no scientific basis for belief that supplying minerals in any degree or any kind will act as an effective treatment for obesity. That applies to seaweeds regardless of the type or regardless of the amount of iodine that is in that seaweed. I might say that seaweeds as a rule have been found to contain about four per cent ash, that is, 141 mineral matter. A large part of the minerals found on analyses is sodium chloride which is on the outside—some if it may be on the outside of the weed when it is dried.

Q. What is sodium chloride, Doctor?

A. That's table salt.

Mr. FAST. I'm going to object to that question. It appears that sodium chloride is included in the kelp that we have in our product.

The WITNESS. Well, it certainly is.

Mr. FAST. Well, I'll show you an analysis of the Department of Commerce which is to the contrary.

Mr. RENNIE. Well, I'll withdraw that question. It isn't material.

The WITNESS. I think it is in the record that he showed me an analysis. Chlorine is present—

Mr. FAST. (Interposing) I object to it. It doesn't appear that chlorine is present in this kelp.

Mr. RENNIE. I've already withdrawn the question, Mr. Fast.

Assistant SOLICITOR. He has already withdrawn the question.

By Mr. RENNIE.

Q. Doctor, do doctors generally approve of a dietary regimen sufficiently low in caloric content to enable the loss of from three to five pounds per week over an extended period?

Mr. FAST. I object to that as not being material in these proceedings. I'll not—excuse me, Mr. Rennie—

142 Mr. RENNIE. (Interposing) The respondent states among other things that the doctors generally approve the scheme which he is promoting if that scheme entails the use of a diet which provides calories which he says are sufficient to enable a loss of from three to five pounds per week. The question I ask now is whether that statement is true; whether doctors generally do approve such a restricted diet for everybody.

Mr. FAST. I challenge the Government's attorney to show me anything in our printed matter that says that.

Mr. RENNIE. I call counsel's attention to representations contained in advertisement inserted in the November issue of Love Magazine.

Mr. FAST. You read it.

Mr. RENNIE. I'm quoting from an excerpt of one of the alleged testimonials.

Assistant SOLICITOR. Quote directly from the exhibit into the record, Mr. Rennie, rather than from your notes.

Mr. RENNIE. All right, sir.

Assistant SOLICITOR. We are all fallible and may make a mistake.

Mr. RENNIE. Exhibit 2-E, quoting from excerpt of one of the alleged testimonials: "Grateful users say: 'Doctor approved' ". That statement is made without any qualification at all and its clear intent is to give the impression to the public that all doctors approve of this scheme.

Mr. FAST. You are just saying that. We have testimonials which we would be very happy to introduce in evidence.

143 Assistant SOLICITOR. I understand, Mr. Fast, but when you adopt a testimonial as proof of the efficacy of your product inserted in an advertisement, you thereby represent to the public that it will do what that testimonial says it will do.

Mr. FAST. That's what her doctor apparently said. We have the testimonial here.

Assistant SOLICITOR. Well, the testimonial can't be introduced because there is no opportunity for cross-examina-

tion of the doctor or of the patient. But you represent in your advertisement, you adopt the language, you adopt the statements as your own representations when you use testimonials, and the courts have so held.

Mr. FAST. Yes, sir, I appreciate that. But what is the connection between that statement and the question? We don't say that all doctors approve it; we know they don't; we don't even say they generally do. We say that doctors have approved it.

Mr. RENNIE. I also call counsel's attention to Exhibit 2-C, an advertisement inserted in Real Story Magazine, January, 1945, in which the following testimonial is quoted: "USERS"—that is, more than one—"SAY 'Doctor approved.'" That too is without reservation to any doctors, or the clear intent of that insertion is to give the impression that doctors generally approve. These advertisements, your Honor, go to the public generally, composed of laymen for the most part.

Assistant SOLICITOR. Read that language again from the testimonial you just quoted.

144 Mr. RENNIE. All right. That is Exhibit 2-C.
(Reading):

"USERS SAY 'Doctor approved.' 'Makes one feel wonderful.' 'Lost 15 pounds in 5 weeks.' 'Feel so much better.' 'Lost 21 pounds in 4 weeks.'"

I'm quoting the entire excerpt through all the testimonials that were quoted on this particular ad. So, in the light of those representations, your Honor, I submit that the question is a proper one.

Assistant SOLICITOR. Have you any statement, Mr. Fast?

Mr. FAST. Those statements do not mean that doctors generally agree. As a matter of fact, I guess the court would take judicial knowledge of the fact that doctors always disagree even amongst themselves.

Assistant SOLICITOR. In some matters they will disagree among themselves. Lawyers will disagree in some matters. But there are some fixed, scientific facts in which doctors may not even agree. I am inclined to interpret the literature, or that language from that testimonial, as perhaps not going so far as to say all doctors agree or all doctors approve the use because that would mean that every doctor does so; some other doctor might have a different idea about treatment. Nevertheless, I think that it might be interpreted that many doctors or that doctors generally—which doesn't mean all doctors when you say doctors generally—wouldn't mean all doctors but it would mean that

doctors generally approved it. You are representing that when you put it in the advertisement which is your advertisement for which you are responsible. And I say

145 it is competent to ask the doctor whether doctors—

I don't believe the doctor would even know whether all doctors might approve or disapprove the treatment. There might be, with the thousands of doctors in the United States, some who might disagree with a fixed scientific fact; they might have different theories. But I think the question is competent if worded "Do doctors generally" or "Does modern scientific consensus of thought or opinion approve of the use of 'Kelp-I-Dine' and the accompanying diet." I think that is a competent question, Mr. Fast.

MR. FAST. May I have an exception to that please?

THE WITNESS. My study of textbooks and modern articles and journals and other research—I feel that there is a general opinion that loss of four or five pounds a week would generally be inadvisable and might be harmful and could be deadly in some cases if that were continued to normal weight, regularly. And while there may be some patients who are excessively overweight who will reduce three pounds a week under careful watching why the possibility of potential dangers and harm is clearly recognized. Those patients need watching and attention. If a person is carefully examined beforehand and shown to be normal in other ways except for his obesity, why there would be less harm of course by reducing three pounds a week. But I am sure it is generally recognized that such reductions might prove harmful in a certain proportion of cases.

Q. Doctor, is your testimony today conformative with the consensus of modern medical science?

146 A. That is just what I testified to. I thought that modern medical opinion was to that effect in regards to this question I just answered and in regards to my other answers also.

MR. RENNIE. All right, thank you, doctor.

Cross Examination.

By MR. FAST.

Q. Doctor, on what do you base your assertion that modern scientific opinion is to the effect that "Kelp-I-Dine" is not proper as an anti-fat?

A. I don't think it is an anti-fat at all.

Q. You don't think so? Then—

A. (Interposing) I have no scientific opinion to lead me to the belief that iodine in any percentage or proportion is

an effective reducing agent, and certainly not in the infinitesimally small dose here, therapeutically speaking, of iodine—four tenths of a milligram a day—or even if he took more in fruit juice or something like that.

Q. Would you say that if the "Kelp-I-Dine" dosage were increased that it would help to reduce?

A. Increased to what per cent?

Q. To any per cent.

A. Well, you could fill your stomach full of kelp and swell up, conceivably; it might not leave room for any food if you filled your stomach up with gum here.

Q. Well, that is the purpose, Doctor, of kelp—

A. (Interposing) No, it isn't.

147 Q. —wait a minute, I haven't finished with the question. Or isn't that the purpose of taking kelp to cause swelling to some extent so that you don't require as much food as the ordinary person would?

A. No, that has no scientific basis of fact.

Q. It doesn't? Well, Doctor, tell us if you will please of what your examination consisted in giving the testimony today. I think you said you examined treatises of—

A. (Interposing) I went into that very fully, I think.

Q. Well, what modern books did you read?

A. I think I read every one of them dealing with obesity—all the textbooks.

Q. Did you read any of the dictionaries on the subject?

A. (Laughing) I wouldn't consider—

Q. —I don't think it's nice—

A. I don't think it is nice to ask foolish questions, either.

Q. Well, I object to that statement—

Assistant SOLICITOR. Let's confine ourselves to the issues, gentlemen.

Mr. FAST. I didn't refer to the Doctor either—it was the learned counsel doing that—

(Unintelligible remarks in the above argument designated by dashes.)

Mr. MANHERZ. Mr. Solicitor, I think counsel is trying to make a joke of this thing. When he asks a foolish question certainly he expects people to laugh at it. If he doesn't, he shouldn't ask such foolish questions—

148 Mr. FAST. (Interposing) I don't think it was a foolish question.

Mr. MANHERZ. You asked a medical question and referred to a dictionary as a medical book, when he knows it isn't a medical book.

Assistant SOLICITOR. Gentlemen, let's be calm about the whole matter. Now, I think that unless the question is incompetent for irrelevancy or some other reason that it is up to counsel for the respondent to determine what questions he wants to ask. So proceed, Mr. Fast.

By Mr. Fast.

Q. Doctor, did you ever read in your research that fucus, which incidentally is a synonym for kelp, is it not?

A. Kelp is used in various ways. Kelp sometimes is used to refer to the burnt seaweed. It is also used to refer to dried seaweed itself. I don't know whether fucus is ever used to refer to burnt seaweed or not; maybe so. It's the genus of the plant or seaweed.

Q. Doctor, did you personally make the test of this "Kelp-I-Dine"?

A. Personally test it?

Q. Yes.

A. What kind of test?

Q. An analytical test.

A. No, I don't analyze the products.

Q. Well, do you know what is in the "Kelp-I-Dine"?

A. Yes, I know what is in it.

Q. How do you know that?

A. Because I know what is in all the seaweeds and I will grant you that this has the average or even the highest maximum proportions of any of the products ever reported from the various analyses. I am familiar with a number of analyses made concerning seaweed of all sorts. And I'll make my same testimony in effect regardless of what kind of seaweeds you use.

Q. What kind of seaweed is this, do you know?

A. What kind of seaweed is this? It's said to be Pacific Kelp on the outside of the box.

Q. Well, is it?

A. Well, I don't know. It doesn't make any difference to me.

Q. Why? Would you testify this way anyway irrespective of what was contained in the kelp?

A. Yes, my testimony is all the same regardless of how the four per cent of minerals and matter is divided among the various preparations. Fucus seaweeds as a rule contain the same amounts or similar amounts of the minerals and there is no basis that I know of for believing that minerals in any matter is the cause of obesity; that this will reduce or will cause a reduction in obesity. That is the

reason I say so and and I say that regardless of the amount of iodine that has been reported in all the forms of seaweed—Pacific Kelp—or no matter how deep you go down to get it, and so forth.

Q. Did you ever, in your scientific explorations come across a statement that fucus has been employed in the treatment of obesity?

A. Why, we have had a number of preparations in the Post Office Department in which it was alleged that seaweed or the iodine in the seaweed would cause reduction of obesity over the fifteen years I have been here. Other
150 forms of iodide have been so sold. Yes, I know that certain people have alleged that iodine and seaweed containing the iodine had alleged reducing properties and they have also alleged that it had fattening properties and sold it for that effect—got testimonials to that effect.

Q. Doctor, who told you that it had fattening properties? Where did you ever find that statement?

A. I said that we have come across preparations being sold through the mail—and the Food and Drug in analyzing has come across preparations being sold direct to the public through drug stores alleged to have fattening properties or alleged to build up the weight, and so forth.

Q. Is Steadman's Medical Dictionary considered a scientific treatise?

A. Not as a scientific treatise for the basis of what certain things will do. It is a rather compendium stating what certain drugs have been used for or that certain drugs have been reputed to have certain value, and so forth. It certainly is not an authority for what drugs are actually, in the modern consensus, shown to do.

Q. You say it is a compendium of medical thought, is it?

A. It is a compendium of reliable and unreliable medical thought. So it will have to be taken with considerable consideration as to that.

Q. Is Steadman's considered reliable?

A. Reliable for what?

Q. Reliable in his research.

A. I wouldn't go to it to find out what a drug would do.

151 Q. I just want you to answer my question.

A. Reliable for research?

Q. Yes, sir.

A. Certainly not.

Q. Certainly not—? Would this—

A. (Interposing) If you want to find a definition of the term or how it is used, why go to various dictionaries. They may differ sometimes as to what the meanings of the terms mean.

Q. Have you found any of the dictionaries to differ as to the use of fucus?

A. There is no scientific medical textbook or other authority that I know of that recommends seaweed as a treatment for obesity.

Q. Have you ever heard of Dr. W. A. Newman Dorland, A. M., M. D., F. A. C. S.?

A. Oh, I know Dorland's Dictionary and Gould's Dictionary and Steadman's Dictionary, yes. I have used them.

Q. You have used them? For what purpose, Doctor?

A. To look up certain words, definitions of terms.

Q. Did you ever hear of Dr. Morris Fishbein?

A. Yes, I have heard of Dr. Fishbein.

Q. Who is he?

A. He has a certain position—I forget, just what it is with the American Medical Association. He is editor of the American Medical Journal.

Q. Considered an authority is he?

A. On what?

152 Q. On medicine generally.

A. He writes on various subjects.

Q. Is he considered a reliable scientific writer by the medical profession?

A. I've read some of his books.

Q. You disagree with him do you?

A. He published one of my articles on obesity in Hygiea. He is the editor of Hygiea also. I wrote an article on obesity for the lay public entitled "Girth Control".

Q. I'm trying to find out from you whether you think Dr. Morris Fishbein reliable as a scientific medical researcher.

A. Dr. Morris Fishbein—most of his statements would be reliable but he might make some mistakes. If I say that all the statements he made are in accord with scientific fact why I might make a mistake.

Q. You would say that for the record?

A. What?

Q. What you have just said now.

A. I know of mistakes that he has made—in other words, of statements that he made years ago and which he has retracted, yes.

Q. Do you consider yourself infallible, Doctor?

A. No, I am not infallible.

Q. Is it possible that your testimony today may be the result of your honest investigation and still be wrong?

A. I think it is in conformity with modern scientific opinion, and unless I find something to contradict me I
153 wouldn't feel that it needs changing in the least. I think it is based upon factual evidence and not upon opinion evidence. I think we have got scientific facts to back up the statements I have made.

Q. Well, what scientific facts do you have to back up your statement that kelp will not help in reducing?

A. I have the knowledge of what iodine will do and the literature is full of statements and iodine is a drug that has been known for a number of years and has been thoroughly tested and proven in obesity and in other diseases. And I have given a number of doses of iodine myself and if the iodine had any reducing properties why it should reduce the fat in the normal person and also the fat in the thin person because our body is composed normally of twelve per cent fat—the normal weight.

Q. What do the—

A. (Interposing) Wait a minute now; I am talking.

Q. Oh, excuse me. I thought you were finished. I don't want to appear impolite and don't want it to appear that way.

A. Oh, I didn't mean to be abrupt, but I am still talking.

Q. Go ahead.

A. I have given iodine in considerable dosages—potassium and sodium iodide—over prolonged periods of time and I've seen people gain weight while they were taking that. I wouldn't credit weight gain to it, but as I said before if the iodine increased metabolism or produced increased energy
154 and thus caused loss of weight, as claimed, why it should also reduce the fat in the normal person and in the thin person because that is the same sort of fat. And I know what the other minerals which are reputed and reported by spectrographic and chemical analysis to be present in kelp; I know that they have been used too under scientific controlled evidence and there is scientific basis for the belief that any of these minerals is the cause of obesity, or produces increased appetite or craving for food to make the person eat more, or that any of these minerals will so reduce a craving when they put on a low calorie diet. That is very scientifically stated in many factual tables and figures by many people who have used

reducing diets. We know what those diets contain in the form of minerals and vitamins and calories and other factors.

Q. Will you quote one of those authorities?

A. No, I won't—

Q. (Interposing) Or tell us one of those authorities?

A. No, I am not stating any definite textbook. My statements here are made upon my reading of all the textbooks and the recent articles and a conference with experts and specialists in treatment of obesity. I don't remember any particular book that would give that statement in the way I gave it.

Q. Well, I mean anything to that effect.

A. I can negatively say that I know of no modern reliable textbook which advocates the use of iodine or minerals or kelp or anything that is in kelp as a practical or effective reducing agent or even as an effective adjunct in connection with reducing diets.

Q. Doctor, what is the reputation of Dorland's "The American Illustrated Medical Dictionary", 1944 edition?

A. I stated that is not a standard work by which
155 anybody would go to for the reference as to what certain drugs would do. You might go to it to see what certain drugs have done or what they have been reputed to have done, but there are no statements made in these dictionaries—for instance, I know of one here a few years ago was carrying the statements to the effect that certain drugs like sarsaparilla, certain plant drugs had value in syphilis. They used to think that thirty or forty years ago before they knew what syphilis was due to, but you can't rely on statements in dictionaries as to what the real effects of drugs are—

Q. You wouldn't rely on such dictionaries—

A. —or drug catalogs.

Q. You wouldn't rely on such dictionary prepared by Dr. Dorland, assisted by Dr. Morris Fishbein, would you?

Mr. MANHERZ. Mr. Solicitor, I object to that question because there is no showing that Dr. Morris Fishbein had anything to do with the preparation of the statement concerning iodine. He may have collaborated in the preparation of the book. But I object to the question because it is too broad and there is no showing that Dr. Morris Fishbein approved that statement.

Mr. FAST. Well, then I'll withdraw the question and put it this way:

Q. Doctor, will you tell us whether or not Dorland's "The American Illustrated Medical Dictionary" is considered a standard dictionary in the medical schools of this country?

156 A. Dorland and Gould and—

Q. (Interposing) Steadman's?

A. —Steadman's are commonly used in medical schools and medical libraries for certain purposes, yes.

Q. Yes sir. Now, in your—and I don't want to get a laugh on this one—in your preparation for your testimony today did you examine any of these works?

A. I have examined the dictionary, since you referred to it yesterday, to see what it said—one of them. I think I was shown the dictionary by the defendant in the case.

Q. Well, now, did you ever read in your investigations—whether you agreed with it or not—that fucus was used as a cure for obesity?

Mr. MANHERZ. Mr. Solicitor, I object to that question.

Assistant SOLICITOR. What is the basis of the objection?

Mr. MANHERZ. On the ground that he is trying to get into the record testimony from a book which he couldn't get in if he offers the book.

Assistant SOLICITOR. Well, if you were blindfolded and didn't know he had the book in front of him, you would never have known from his question though that he was reading from a book. He didn't ask it as a quotation from a book. He didn't ask it—he merely asked a question which to me is perfectly competent.

Mr. MANHERZ. I withdraw the objection.

The WITNESS. I have seen statements in dictionaries to indicate seaweed has been used as a treatment, or reputed to have some value in the treatment of obesity, yes.

157 By Mr. FAST.

Q. Have you any basis for stating that that statement is untrue?

A. Certainly, I have. I've—

Q. Well, what is your basis for—

A. —my whole testimony already given is—

Q. —well, I'm trying to find out what your authority for your statement is.

A. Way back 35 years ago in 1910, somebody reported that iodine had some value, but since then other people have made tests and have tried the preparations and the same books that once said that iodine might be good for obesity are now saying it has been reputed to be or formerly used or was contained in nostrums sold for obesity, and so forth.

But certainly no reputable textbook that I know of dealing with the treatment of obesity and effects of drugs thereon—textbooks that are used as authorities for such statements—I don't know of any of them that say that iodine is effective, or seaweed or any of the minerals or any of the other ingredients in seaweeds have any value for reducing.

Q. Doctor, I asked you did you consider the 1944 edition of "The American Illustrated Medical Dictionary" endorsed by Dr. Dorland as reliable?

A. Not as a reliable authority for the action of drugs. No, it certainly is not.

Q. Well, how can you account, if possible, for Dr. Dorland including in his book—

Mr. MANHERZ. (Interposing) Mr. Solicitor—

158 Mr. FAST. Let me finish—

Assistant SOLICITOR. Let him finish his question.

Mr. RENNIE. Will you state the question a little louder, please? I didn't hear it.

By Mr. FAST.

Q. How do you account for Dr. Dorland, who you said a few moments ago was reliable—whose dictionary was reliable—making statements such as are made herein which are different from your testimony? I am referring to the 1944 edition.

Mr. MANHERZ. Mr. Solicitor, I object to that. There is no showing that there is any such statement made. There is nothing in the evidence to show that. That is just a statement by counsel.

Assistant SOLICITOR. Aren't you going beyond the rule, Mr. Fast, that I expressed yesterday; whether I be right or wrong, it's my ruling.

Mr. FAST. Well, may I attempt to offer it for the record?

Assistant SOLICITOR. You, indeed, you have that right.

By Mr. FAST.

Q. Doctor, I show you "The American Illustrated Medical Dictionary" of Dr. Dorland, 1944 edition—I don't want you to take my word for it either. I refer to the word "fucus". Will you read it to yourself?

Mr. MANHERZ. Now, Mr. Solicitor, I want to state now, before—

Assistant SOLICITOR. (Interposing) Wait just a minute, Mr. Manherz. Let the doctor read it and then make your objections.

(The witness reads as requested.)

Assistant SOLICITOR. Now the doctor has read it, I'll hear your objection. Mr. Manherz.

159 Mr. MANHERZ. I am going to object, Mr. Solicitor, to any questions based upon the book named. It is an improper way to attempt to put in medical testimony.

Mr. FAST. Well, my authority is this: This man referred to the book as a reliable, standard book. In those circumstances where I have a perfect right to ask questions and to have the hearer in determining this matter to consider standard works, my authority is the citation I gave you yesterday in *Corpus Juris*.

Mr. MANHERZ. Mr. Solicitor—

Assistant SOLICITOR. (Interposing) Well, now—

Mr. MANHERZ. —I don't think witness referred to this book as his authority. In fact, he specifically said he wasn't going to name any authorities. Counsel tried to drag it in, and the witness said that he did not regard it as a reputable authority for the purpose as stated. I think that the rule that counsel is citing in the case mentioned doesn't apply to that kind of a publication, and that mode of introducing it. I think it is still objectionable.

Assistant SOLICITOR. Mr. Fast, didn't the doctor fairly specifically state to what extent that or the other medical dictionaries were reliable?

Mr. FAST. Well, that's his opinion. He stated this in very plain words that these authorities are used by doctors and by medical schools and when a man testifies that he has made medical research and I can show a book which he considers to be reliable, then I have a perfect right to interrogate him with reference thereto.

160 Assistant SOLICITOR. You have heard the Doctor state, though, Mr. Fast, that a medical dictionary was not reliable for the purpose of scientific determination of the efficacy of some drug or product which was attempted to be defined therein?

Mr. FAST. Well, that's what he said; there is no question that he said that; but he can't say that for some purposes it is reliable and for some purposes it is not. He can't differentiate.

Assistant SOLICITOR. Well, he did so state.

Mr. FAST. Well, I think the Doctor ought to be told that this is a very serious matter and it is not a joke.

Assistant SOLICITOR. Well, I can't control, Mr. Fast, other people's reactions to things. I don't consider this proceeding a joke I assure you.

Mr. FAST. I know you don't, sir. I am sure you don't and I'm asking the questions and speaking, and this man laughs. I don't think it is—

Assistant SOLICITOR. (Interposing) But I'm only trying to follow the rules of evidence as I understand them, and I don't think that you would have the right to contradict the Doctor by a medical dictionary. I think that competent medical expert testimony could be brought in to contradict the Doctor.

Mr. FAST. Ordinarily I would agree with you, but this man said he made an investigation and I'm trying to find out whether he investigated everything that was available.

161 Assistant SOLICITOR. Yes, but he stated this with regard to his investigation and he said the word "negatively" in his statement. He says "I might say negatively that I know of no modern textbook or no treatise upon the subject which states such and such". That was his position. He didn't state that his opinion was based upon any particular treatise or any particular textbook. He merely stated that he knew of none which agreed with your statement of scientific thought.

Mr. FAST. Well, I ask your Honor: I was going to offer this book for the purpose of marking for identification. I am assuming that your Honor will deny me this—

Assistant SOLICITOR. Couldn't you for the purpose you offer it, for identification, merely let the record show that it is such and such a dictionary of the edition of 1944, or whatever year, without leaving it here or anything of the kind? I think it would be sufficiently identified what you offer.

Mr. FAST. Alright. Then I desire—

Assistant SOLICITOR. In other words, there is no occasion for your leaving the book here as a permanent part of the record or even a temporary part of the record.

Mr. FAST. I desire to offer for identification The American Illustrated Medical Dictionary by Dorland, 20 edition, published in 1944, particularly the statements under 'fucus',—I'm not going to read it in—on page 588.

Assistant SOLICITOR. Don't you think that sufficiently offers it for identification?

Mr. FAST. I think it does.

162 Mr. MANHERZ. Mr. Solicitor, of course we object to the cluttering up of the record of any such identification. It serves no purpose here, has no value whatsoever, and the mere offering it for identification is an obvious attempt on the part of respondent to put in something that has no evidentiary value in this case. And I move that

it be stricken and not accepted even for identification purposes.

Assistant SOLICITOR. I deny your motion for this reason, Mr. Manherz: Mr. Fast is looking after the interests of his client; he may be laying the foundation for a subsequent law suit; it may be that he thinks, that it is his opinion that our refusal here to receive that might be grounds for sustaining such law suit that he brings and he certainly has the right to offer it and have me to rule on it. Now, I sustain your objection to the introduction of the book, but counsel certainly has the right to identify, to show whether or not I am in error in refusing the admission of it. I sustain your objection to the evidence, but he definitely has the right to offer it for identification. Now, he is not putting in there what it says concerning focus; I'm not receiving that into the record.

Mr. MANHERZ. Mr. Solicitor, in that connection I would like to state that there has been no identification here. Counsel stated he is not on the stand—

Assistant SOLICITOR. (Interposing) I understand—

Mr. MANHERZ. —and counsel's statement that that is a certain work doesn't prove anything. So even for purpose of identification—

163 Mr. FAST. (Interposing) You are perfectly right.

Mr. MANHERZ. —it shouldn't be admitted.

Mr. FAST. You are perfectly right. I withdraw it.

By Mr. FAST.

Q. Doctor, have you ever seen this work before, "The American Illustrated Medical Dictionary" of Dorland, 20th edition, 1944?

A. Yes, I've seen Dorland's dictionaries, I don't know whether 1944 edition or not.

Q. Well, if you don't, we'll look at it. You don't think this is a fake, do you?

A. No, I think that is the regular dictionary put out by Dorland.

Q. 1944 edition? —

A. Yes.

Mr. FAST. I now offer it for identification.

Assistant SOLICITOR. And I will consider Mr. Manherz's motion and separately Mr. Manherz's objection as though it were now made after the proper identification.

Mr. FAST. Well, I was going to offer it later. I was going to offer it when my case comes up. I understand I can't offer it while the Government's case is on.

Assistant SOLICITOR. Well, you may have the right then, but I have to rule now on Mr. Manherz's objection. I overrule his motion and say that you have the right to identify it or to show that you have offered it. But I sustain his objection to its being introduced as evidence into this record.

164 Mr. FAST. Well, will your Honor withhold that for just one second? I want to introduce two books for you to make the same ruling.

Assistant SOLICITOR. I've already ruled but I'll be glad to reconsider.

By Mr. FAST.

Q. Doctor, is this a fake—Steadman's Medical Dictionary, edition 1942?

A. It looks to me like an ordinary dictionary.

Q. I mean, is it Steadman's?

A. Yes, this is Steadman's.

Q. Both Steadman's and the other one, Dorland's, are reliable dictionaries, are they not—medical dictionaries?

A. They are medical dictionaries in common usage.

Q. I ask you to look under the heading "fucus" on page 425 of Steadman's Medical Dictionary.

(Witness reads as requested.)

Mr. FAST. I offer page 425 of Steadman's Medical Dictionary, 1942 edition, which the witness has just observed, for identification.

Assistant SOLICITOR. Specifically referring to such part of the dictionary as refers and defines there "fucus".

Mr. MANHERZ. The same objection, Mr. Solicitor.

Assistant SOLICITOR. I sustain the objection, Mr. Fast.

By Mr. FAST.

Q. Now, Doctor you testified that in your examinations nowhere did you find any statements that indicate that fucus can be used in the cure of obesity. Is that right?

165 A. I said that in my examination of textbooks which I consider the authorities or the place to go for an authority on obesity and the effects of drugs on obesity, the books of internal medicine, in articles published along those lines, as being the places to go for authority as to the consensus of opinion, and also to modern pharmacologists dealing with the action of drugs. I have consulted those and I think I know what the modern opinion is and I've found in none of those any opinion which would lead me to believe that seaweed in this dosage has any value whatever in the treatment of obesity for any purpose.

Q. Now, Doctor, will you be good enough to give us the authorities that you used in coming to that conclusion?

A. I stated that I had looked in all the textbooks of internal medicine dealing with the question of obesity and all the modern pharmacologists. Now, that is enough—

Q. (Interposing). All that have been published?

A. I've gone down to the Surgeon General's office and looked at the names of all of them and I've got them out and I've reviewed the treatment prescribed in those books, particularly in line with obesity. And I have also examined iodine for a number of causes—in connection with asthma treatments and things of that sort.

Q. In your examinations have you come across a book known as "Pharmaco-Therapeutics Materia Medica and Drug Action" by Solis Cohen and T. S. Cithens, published by Appleton in 1928?

A. Yes, I am familiar with Solis Cohen's.

Q. What is his reputation?

A. Well, he has been dead a long time.

166 Q. Well, he still has a reputation, hasn't he, Doctor?

A. Well, I don't think any statements he made in 1928 would be considered as being modern reliable medical opinion.

Q. You don't think so?

A. No, unless they were based on facts. He might have expressed some opinions. I think Solis Cohen, particularly in connection with glandular diseases has made—I know he has made a number of statements that are not reliable now according to the facts which have now been discovered.

Q. You mean bodies have changed, have they, in form?

A. What is that?

Q. Have bodies changed in form since Dr. Solis Cohen—

A. (Interposing). Bodies have not changed in form, but the knowledge of glandular diseases particularly has advanced considerably and facts have been learned that were not known then.

Q. Doctor, in your investigations you testify here today, did you ever come across a statement something like this: Fucus (bladder-wrack)—and incidentally, bladder-wrack is a synonym, is it not, of fucus?

A. Yes, bladder-wrack is commonly used for seaweeds.

Q. And fucus is also a synonym, is it not, for kelp?

A. Oh, I think they make some distinction, but I—

Q. (Interposing). What is the distinction?

A. I mean some people refer to certain types of seaweed as being bladder-wrack, and fucus is the name applied to the genus as a whole, various forms. But I don't
 167 know whether they—my testimony is based upon seaweeds, bladder-wrack, kelp, and considering that their analyses—particularly of the mineral element and the gum element—are somewhat the same or essentially the same.

Q. In your study did you ever come across statements something like this: "That fucus (bladder-wrack) contains a considerable proportion of readily assimilable iodine and was at one time given raw or in the form of charcoal in the treatment of goiter and as an anti-fat remedy. This and several other species of fucus and Laminaria given in finely chopped particles are sometimes used like agar to relieve costiveness by increasing the bulk of the intestinal contents." Did you ever come across such statement?

A. I think it is agreed that if you get enough of the agar or other forms of gum and give enough of this to produce some swelling in the intestinal canal, that that does have some laxative properties by supplying a bulk. A large part of this stuff is not absorbed and it holds water in the intestine. And it is admitted that if you give enough gum, it does have some laxative properties; but that has nothing to do with obesity.

Q. I'm not talking about obesity; I'm talking about reducing.

A. You've asked me if I've seen books in which it is stated that iodine in kelp—yes, I've stated that before that I've seen books in which it is stated that it has been used for that purpose, but that doesn't to my mind signify any approval of its use for that purpose and the very fact that it says it has been without saying it is used now indicates that it has been rejected to my mind.

168 Q. Now, tell me why do you make that statement?

A. Well, because I think the English language alone is enough to draw that conclusion from it, but I—

Q. (Interposing). What facts justify you making that statement?

A. I've seen similar statements in other books in which it states that it was formerly used and once used, and so forth and so on.

Q. Well, you don't have those books here, do you?

A. No, I haven't those books here, but I know that such statements are made.

Mr. FAST. Well, I move your Honor please that all that testimony be stricken on the grounds—

Mr. MANHERZ. Mr.—

Mr. FAST. —on the ground that he says that he has taken these from books; he is quoting from books and he doesn't know where they are from and I think we have a right to see the originals.

Mr. MANHERZ. Mr. Solicitor, this witness is testifying as an expert witness and his testimony is based on all of his medical training, knowledge, experience, conferences and a reading of books and he so stated. And I think the question that the counsel asked was answered by the answer that the doctor gave. In other words, that the answer was in response to the question. Since the counsel got that answer I think he is stuck with it.

Mr. FAST. I'm not stuck with anything and I don't like your attitude. I want that on the record—

Mr. MANHERZ. (Interposing) Just because he is displeased with the answer—

169 Assistant SOLICITOR. (Interposing) One at a time, gentlemen. This recording machinery we have here doesn't record more than one voice. What is your—

Mr. FAST. I'm not stuck with anything. This man testifies that he got his information from books, and he says that these books state that the theory that we are trying to present to the court is an exploded one, it was an old one. I'm asking him to refer to the books, and I think we have a perfect right to find out in what books they were; and if he doesn't know them, we have a right to see the books.

Assistant SOLICITOR. Mr. Fast, the Doctor nowhere in his direct examination stated that he relied upon any particular book or group of books for his opinions which he stated. If he had done so, you would have the right to ask him the books—or perhaps he would have stated in direct examination upon what books he relied. Then you might have contradicted him if the book didn't state what he said it did if he were relying upon that. Now I think that a Doctor, like a lawyer arriving at what the law is, can read extensively upon any subject of medicine; he may evaluate all of his readings, and then reach his own conclusions as an expert. Now, the Doctor has stated that he has read in books—upon your cross examination—that he has read in books, that those theories of medicine were once advanced. Then he follows that by the statement that in modern textbooks and in modern medical journals or treatises upon the subject he finds nothing therein which says that iodine or minerals in

vegetable matter such as seaweed would in any way be efficacious in the treatment of obesity. He says he finds nothing to sustain that theory. Now, if that's
 170 negative testimony, he admits that there may be books in which that is stated, but if I relax the rule and permit you to contradict him I am violating my basic rule that the doctor cannot be contradicted by medical books by authors who are not here for cross examination.

Mr. FAST. Well, this man testified that he has examined every book on obesity.

Assistant SOLICITOR. That may be true, sir, yes;—

The WITNESS. (Interposing) I said in certain fields—

Assistant SOLICITOR. He concedes that certain books which he doesn't consider as containing the consensus of scientific thought or which may be out of date, and so forth,—now he has admitted the dictionary was good for a certain purpose but not for determining with scientific exactness the efficacy of any drug in the treatment of any disease.

Mr. FAST. Well, I ask your Honor to grant me an exception.

Assistant SOLICITOR. So, I sustain the objection to the question.

By Mr. FAST.

Q. Doctor, have you made any experiments with "Kelp-I-Dine"?

A. No, I have not.

Mr. FAST. Now I want to offer formally on the assumption that I know, according to the rule of evidence, that I have to offer it with my case but so that I can get a ruling: I want to offer in evidence the sections in "The American Illustrated Medical Dictionary", Dorland's 1944, under—
 on page 588 specifically—under the subhead "fucus";
 171 "Steadman's Medical Dictionary" on page 425 under the heading of "fucus".

Assistant SOLICITOR. Aren't you merely repeating the offer that you made before, Mr.—

Mr. FAST. (Interposing) I made it just for identification before.

Assistant SOLICITOR. Oh, and you are now offering them?

Mr. FAST. In evidence. I know that there is objection to my offering them at this time because it is not my case, but I would like it to be assumed that as part of my case I desire to make these two offers.

Mr. MANHERZ. I object to it too, Mr. Solicitor.

Assistant SOLICITOR. Of course, the offer as your own evidence would be technically a little out of order. But we will not consider that. We will consider that you are offering them and not question the order in which you offer them, and I'll rule on them with that in mind. So, I rule that they are not competent evidence and sustain the objection of Government counsel.

Mr. FAST. And I ask for an exception.

Assistant SOLICITOR. Let the record note your exception.

By Mr. FAST.

Q. Doctor, what is an anti-fat?

A. I think you are using an adjective for a noun.

Q. I want to know what it is.

A. Well, you are using it—the word anti-fat remedy is commonly used or something like that. But to use it as a noun, I don't know if it is commonly used that way—it might be sometime. But anti-fat just means something that works against fat, that's all.

172 Q. Isn't kelp considered an anti-fat?

A. No, sir, it is not.

Q. When did they change that in the dictionary, do you know?

A. I don't get my statement of what drugs do from the dictionary. I told you that before.

Q. You mean you get your definitions from the dictionary, don't you?

A. Possibly. A lot of times a dictionary is wrong as to what the meaning of a word is. We get our—there are connotations and things like that that come from your wide reading of medical literature—the medical dictionary may be—I can give you instances where they are behind. I don't mean many times—I may have made a mistake there—but on the finer meanings of the word the doctor has to know what those words mean from his studies and from his talking with other folks and how it is commonly used. The mere fact that it is stated in the dictionary is a very brief statement and there are various connotations that cannot be covered in a short space of a dictionary. The '44 edition ought to be more or less in line with the common usage of words, but it isn't always.

Q. Doctor, what is your connection with the Post Office Department?

A. In this particular case the preparation analyzed by Mr. Casey and his analysis was presented to me and I was requested to give a statement as to whether or not the claims made in this literature were in accordance or in conformity with medical consensus.

Q. And yet you made no "Kelp-I-Dine" tests at all, did you?

A. No, I didn't have to. I know what is in kelp and I had a number of cases involving kelp and iodine and also other mineral matter—

173 Q. What cases did you have? Describe the type of cases involving kelp, that you personally had.

A. We have had over the fifteen years or more I have been here a number of alleged obesity treatments in which kelp played a part in some and iodine played a part, and in which iodine was used for other purposes and in my studies on these cases I am able then from my reference to analyses in numbers of cases of kelp—the mineral analyses—to draw my conclusions.

Mr. FAST. I ask that the answer be stricken as not responsive. I understood the witness to say that he personally had cases, and by that I meant that he treated cases involving kelp. That is the only natural inference that—

The WITNESS. No, I never have treated anybody—

Mr. FAST. (Interposing) With kelp?

The WITNESS. With kelp, no.

By Mr. FAST.

Q. And you know of no cases that were ever treated with kelp, do you?

A. What do you mean, I know of no cases?

Q. Do you know of any cases where people took kelp?

A. Yes, I said we have had a number of cases in the Food and Drug and in the Post Office Department in which we have investigated companies selling kelp for various purposes.

Q. I'm not talking about that—I'm talking about—

A. I know that a lot of people use it and I know it is being sold now in certain—

Q. (Interposing) Did you examine any of the witnesses that you know bought it?

174 A. Oh, no, I haven't made any—

Q. (Interposing) For the purpose of seeing what effect "Kelp-I-Dine" had on them?

A. I haven't made any tests of the witnesses.

Q. So that you don't know whether or not the kelp in this case or any cases that you may have had in this Department or any other Government department had any effect one way or another—

A. (Interposing) Yes, I do too.

Q. —on people. Give us the nature of those cases.

A. Why, I don't have to give you any names of cases.

Q. Yes, you do—you said you knew some.

A. I said I know some—you said I have no basis for concluding—

Q. I didn't say that—

Mr. MANHERZ. (Interposing) Mr. Solicitor, I think this thing of counsel to witness arguing back and forth—I think counsel should put his questions in the proper form and the witness answers if he knows. If he doesn't know, let him say so.

Mr. FAST. When I need counsel's assistance, I'll ask for it.

Mr. MANHERZ. Then I object to the argument, the counsel arguing with the witness. If he doesn't want to put his—

Mr. FAST. (Interposing) I put questions, I think, in a way that are intelligible to the witness—

The WITNESS. (Interposing) They were not.

Mr. FAST. —and expect the witness to—

Assistant SOLICITOR. (Interposing) Well, gentlemen, with both lawyers talking and the witness talking,
175 I'm a little confused myself about what is going on here.

Mr. FAST. I want to find—let me try to clear it—I want to find out from you, Doctor, whether you have personally examined any individual who took kelp.

The WITNESS. Well, I answered that once. Why do you—

Mr. FAST. I think you did. What was your answer?

The WITNESS. My answer was "no, not that I know of." You asked me if I knew of anybody taking it. Certainly I know of a number of people that have taken it.

Mr. FAST. You examined them to find out what effect it had on them?

The WITNESS. No. Such and such an examination—

Mr. FAST. (Interposing) There is no question pending before the—

The WITNESS. (Interposing) I would like to finish my—

Mr. MANHERZ. (Interposing) Mr. Solicitor, I think the witness has a right to explain his answer.

The WITNESS. My examination of the patient wouldn't be worth a whoop unless I knew of all the other factors incident to his taking of this—how much diet, weight and balance diet, how much exercise, and things of that sort. Now, patients have been put in calorimeters and kept under very exact control conditions, and iodine and iodine-bearing preparations which have been given these people.

By Mr. EAST.

Q. Do you think it would be possible for a patient to take "Kelp-I-Dine" regularly for four weeks and to lose seven pounds, and still have no ill effects therefrom?

A. Four weeks?

176 Mr. EAST. Yes.

Mr. MANHERZ. Mr. Solicitor, I admit the question is ambiguous. It has within it the inference that the patient lost seven pounds from the taking of "Kelp-I-Dine" and it might draw from the Doctor an answer which would indicate that he believes that's a fact. I think the question is ambiguous.

Assistant SOLICITOR. The question though was put to the Doctor as an hypothesis. He hasn't stated that a patient did lose that as I recall the wording of his question. So if it is put to the Doctor as an hypothesis, I think it is a perfectly proper question, and so rule.

The WITNESS. I have not advanced the idea here that one-half teaspoonful of this kelp is dangerous or harmful in itself. There are people with diseases of the thyroid, tuberculosis perhaps, or diabetes and things of that sort, that larger doses of iodine might be harmful in. But with this small dose it would be very difficult to prove it is harmful and I haven't made any attempt to say that this preparation in itself is harmful.

By Mr. EAST.

Q. I'm trying to find out, Doctor, whether it would be possible for a woman to take "Kelp-I-Dine" in the dosage of one-half teaspoonful in the morning and Dr. Phillips' menu regularly for four weeks and lose seven pounds and feel well.

A. Yes, a person may lose seven pounds in four weeks, and feel well.

Q. Is it possible for a person to use "Kelp-I-Dine"—pardon me, I thought you were through.

A. Well—that feeling well, that is, may be hungry or have discomforts incident to the reducing diet—but that is a loss of less than two pounds a week. People can lose one pound and some can lose two pounds without being excessively hungry, but when you get beyond that they generally are, and some of them with two pounds and some with one pound may be hungry, and some of them getting all they need. Obese people have been put to bed on a maintenance diet after it was proven definitely by tests what amount of calories they needed, and

then they were given 200 calories above what they actually needed and every one of them in a large group reported that he was hungry.

Q. Well, if the diet and the "Kelp-I-Dine" were used regularly by a person who was willing to eat less so as to conform to Dr. Phillips' diet, would you say that such person would be harmed?

A. No. Some people could lose a pound or two a week and not be harmed, depending upon—a number of people can lose a pound or two a week and not be harmed and following this diet, too. But, some of them may.

Q. Let me ask you this, Doctor: Would it be possible for a person to use "Kelp-I-Dine" and this diet regularly over a period of four weeks and lose sixteen pounds and still be unharmed?

A. I made a statement on that that—I doubt if there are many people who will lose four pounds or more a week on this diet alone. They would have to add additional exercise for the reason that—You would have to reduce your diet down to something like 2000 calories or more below the actual needs per day in order to lose that amount of poundage in a week because each pound of fat you burn up in your

body supplies eight grams or slightly more, or eight
178 calories per gram of the fat, and each pound of fat has something like 480 to 500 grams according to how you figure it, roughly 480 grams. And so purely from the diet alone it is hard to lose four pounds a week—this particular diet, even if you figure the minimum helpings there. But there are people who for short periods of time, say for a month, can lose four pounds on diets and not be harmed, yes. And some will be harmed, yes.

Q. Well, what type of people would be harmed?

A. Well, it all depends. I think there are a number of people with various chronic diseases that have been named, and some of these are latent—they don't know they have. I think there is that possibility of harm in the heart, arterial, kidney, and liver, certain cirrhoses, and diabetes and tuberculosis and other factors. They include a large proportion of the common, chronic diseases and these are not uncommon in the fat people because a person having a chronic disease is inclined to take less exercise and therefore it is easier for him to put on weight.

Q. Doctor, would a person having a heart condition be advised by you and by the doctors generally to reduce in weight?

A. A number of people with heart disease, or a considerable proportion of them should reduce and are better off if they are normal weight, yes. That's true, if they are handled individually, and the rate of their reduction is carefully managed.

Q. In other words, you wouldn't want them to lose too much at one time?

A. That's right.

Q. Well, you hinted they can't lose an awful lot on "Kelp-I-Dine".

179 A. "Kelp-I-Dine" won't help them to lose any, that's what I said.

Q. Well, Doctor, would you think it is bad for people who want to reduce in weight to become acquainted with a system of this kind, if it helps them. Do you think that would be bad?

A. That's a very bad question—

Mr. MANHERZ. (Interposing) I don't think that is a medical question. I object to that.

Mr. FAST. Well, I'll withdraw the question and put it simpler.

By Mr. FAST.

Q. In your opinion, is there anything wrong in an individual who wants to reduce weight to take this course of "Kelp-I-Dine" and Dr. Phillips' Method?

A. Yes. If they select calorific diets say of eight hundred as shown by the sample menu—and they can reach that or even less—if they cut their helpings small and avoid skim milk and jello and other things as stated—if they cut their calories down 800 and below or even 1000 and below and particularly if they increase their walking and walk as much as possible, there is a potential danger of harm and serious results may occur in some cases and in a number of cases it is likely to produce harmful effects and symptoms.

Q. Do you know of any cases where "Kelp-I-Dine" has created such condition of a harmful effect for reduction?

A. I said I thought "Kelp-I-Dine" of itself was harmless. I don't know of any patients who have taken "Kelp-I-Dine" system, diet or exercise who have been harmed,

180 but I know of other cases that have employed similar reducing regimens and have tried to walk and have taken undue exercise and have been harmed undoubtedly.

Q. Doctor, would you say that a conscientious doctor

could differ with you in your findings about the effects of "Kelp-I-Dine"?

A. I don't know what you mean by conscientious doctor. I believe that a doctor who is looking for scientific facts would find the same as I have, all of them. That is what I believe.

Q. Well, for example, where doctors have advised the use of "Kelp-I-Dine", do you think such doctors—

A. (Interposing) You might use "Kelp-I-Dine" for supplying iodine, I just said, but so far as reducing effects I think if any doctor gives that he is not in conformity with medical opinion as to the value of the preparation. I think he has been fooled somewhere. I don't think he has got any scientific basis for so prescribing it.

Q. So that you think such doctor has no right to—

A. (Interposing) He has got a right to prescribe "Kelp-I-Dine" if he wants to—

Mr. RENNIE. The fact that the doctor may have a right or not have a right to prescribe "Kelp-I-Dine" is not a question for a doctor. That is a question of law.

Assistant SOLICITOR. I think if he has a license to practice he has the right as such—

* Mr. FAST. (Interposing) To differ with the witness.

Assistant SOLICITOR. —to differ with the witness, yes. Certainly he has a right to do that and he has a right to prescribe what in his judgment may be best for his patient.

So I don't think the question is competent, Mr. Fast.

181 By Mr. FAST.

Q. Well, Doctor, what would you say if I showed you a batch of testimonials from people who reduced some sixteen pounds in four weeks and some twenty-three pounds in five weeks and some of whom stated that they had discussed this with their doctor and their doctor recommends that this course of treatment is for the purpose of reducing? Would you say that they were false?

A. They were false? Who is they?

Q. They is the plural for letters.

A. Oh, the letters are false? What do you mean "false letters"—faked or—

Q. (Interposing) Yes, do you think they are fakes?

A. No, I think people probably got reduction somewhere around what they state. I don't think they are misstating facts on the amount of reduction they secured; but I think if they credit "Kelp-I-Dine" with doing it, they are entirely wrong.

Q. You do think so?

A. Yes.

Q. Why do you say that, Doctor?

A. I don't think it has any reducing properties. There is no scientific basis for belief that it has. And because it was used with a reducing diet which together with the exercise advised would in themselves without any "Kelp-I-Dine" produce losses of weight, in that figure, sometimes.

Q. Well, what would you have to say as an expert: That if these people had never made these losses in weight prior to taking "Kelp-I-Dine" and Dr. Phillips' menu?

182 A. I said Dr. Phillips' menu, a thousand calories or possibly 800, or even if you got to 1200, would ordinarily reduce some poundage and some of them might get three pounds—I don't think that many would get four unless they take increased exercise above what they would and very few would get five under the same circumstances.

Q. What effect does iodine have upon a person's metabolism?

A. A normal person? This amount of iodine or normal amounts of iodine have no effect one way or the other.

Q. Would a larger portion have any effect upon one's metabolism?

A. Speaking of the obese people who are obese just for overeating, iodine will not have any reducing properties unless you give large doses enough to effect the appetite. If you take a lot of potassium iodide and sodium iodide, it irritates the stomach and might affect the appetite and cause them to eat less.

Q. What amount of iodine would increase the metabolism of any normal individual?

A. Well, I said before that I have given iodine for certain other diseases and I have seen people increase their weight, and I don't believe it increases the metabolism. I'm not—

Q. (Interposing) You don't think so?

A. That's my opinion, yes.

Q. Did you find that in approved scientific medical journals, that statement?

A. It's my statement all the way through, sir.

183 Q. I'm trying to find out whether your last answer is based on any scientific research made by you?

A. I didn't say I had made any research on iodine, but I have given iodine to a number of people and they didn't lose weight and I've seen some of them gain weight with considerable doses of iodine—ten grains of potassium iodide several times a day put on weight and reached normal

weight when they were underweight. And if this did increase the energy like you say, it would act like the thyroid, desiccated thyroid—

Q. (Interposing) I object to his response. I only asked him whether his last question is based on scientific research.

A. Yes, it is.

Q. Would an increased metabolism cause a reduction in weight, Doctor?

A. No, not necessarily—

Q. (Interposing) That is—

A. —let me answer, please. Small amounts of desiccated thyroid containing thyroxin—the hormone of the thyroid—may increase metabolism as shown definitely, and that person may gain weight with these small amounts, small increase in metabolism because they feel peppier and eat more and the whole question of whether they put on or gain weight revolves itself on the amount of exercise and the fuel consumption as compared with the energy needs. If they eat more food than they need, they will put on weight despite the increased metabolism.

184 Q. Would the normal person taking a normal diet, taking iodine, increase his metabolism to the extent that he would lose weight?

A. It is my opinion, and I think it is based on the facts, that they will not.

Q. Will not?

A. They will not. The thyroid gland takes up extra amounts of iodine to the point where it is saturated and any other iodine that is consumed is excreted by the urine and otherwise.

Q. Doctor, take the average, ordinary person: I should like to find out from you how much iodine it would be necessary for that person to take in order to increase his metabolism so that he could lose weight?

A. I've answered that before. I don't believe it is the iodine—

Q. (Interposing) No, you didn't—

A. —Yes, I have.

Q. Well, if you did, I'm sorry: I don't remember it.

A. I said I didn't think iodine, particularly as contained in kelp—

Q. (Interposing) I didn't ask that. I asked iodine—I didn't ask about kelp.

A. Well, that's what is at issue here. The question doesn't seem to have any bearing then if it is not talking

about kelp and the iodine in kelp, the iodine as taken in kelp.

Q. I think I have a perfect right to ask that question to test this man's credibility.

A. I answered it several times that the normal—

185 Q. (Interposing) You answered only about kelp—

A. (Interposing) I said normal doses of iodine in the normal person—I have answered it three or four times in the last five minutes—in my opinion did not increase the metabolism.

Q. My question was to find out how much iodine *will* increase metabolism.

A. Well, I'm not—that's a supposititious thing.

Q. What do you mean by supposititious—

Mr. MANHERZ. (Interposing) Mr. Solicitor, we object to that question. If he is going to delve into the realms of some other field, I don't think it is pertinent. We have here a definite preparation of a known quantity of iodine and we are considering that preparation. What may be in some other field of medicine is not pertinent to the issues here, and if respondent wants to delve into some other field, I don't think this is the place to do it. I submit that he shouldn't be permitted to obtain medical information from this witness on some other subject. I object to the question.

The WITNESS. I might say that—

Mr. FAST. Let me answer it.

The WITNESS. Well, I want to say that in any actions of drugs small doses may produce effects where large doses would be entirely poisonous and you can't draw conclusions on the basis of—

Mr. FAST. We maintain, if your Honor pleases, that our dosage with the menu will help to reduce the person's weight. We maintain that there is enough iodine in our preparation to enable the person with the diet to decrease in weight. This man says that as far as he is
186 concerned iodine has nothing to do with reducing weight.

Assistant SOLICITOR. Yes, and he has—you may have forgotten, Mr. Fast—but he has testified that two or three times.

Mr. FAST. Well, if he has, I am satisfied. I don't remember any—

Assistant SOLICITOR. (Interposing) He has testified that iodine would not—unless my memory is false.

Mr. FAST. I really don't remember it. I—

Assistant SOLICITOR. It's my recollection and that is all I can state that it is my recollection that he has said that iodine would not increase metabolism and that it would not reduce weight.

Mr. FAST. Well, if that is the testimony, I don't want to ask him anything else.

Assistant SOLICITOR. That is my recollection of the testimony. He did not—I don't want to try to state what conclusions should be reached by the evidence in the record—but he did state that there were some extreme cases where enough iodine, as I recall his testimony, would irritate the stomach to the extent that it might kill ones appetite. Did you so state, Doctor?

Mr. FAST. I remember, but I don't remember any testimony which would indicate that the witness testified with regard to the extent of iodine that would be necessary to increase ones metabolism so as to enable him to reduce in weight.

Assistant SOLICITOR. Well, if he has testified though, Mr. Fast, that it would not have increased the metabolism, then how could we delve into the question of to what extent or to what dosage of iodine would increase it when he has stated in his opinion it would not at all increase it.

187 The WITNESS. Well, I can summarize if you wish.

Assistant SOLICITOR. Well, wait until he asks the question, Doctor.

Mr. FAST. I have no further questions.

Assistant SOLICITOR. Does that conclude your cross-examination, Mr. Fast.

Mr. FAST. Yes, sir.

Re-direct Examination.

By Mr. RENNIE.

Q. I would like to ask Dr. Norris one question on redirect. Doctor, do you consider that testimonial letters of lay users of medical preparations as having any scientific value in determining the effects of such preparations?

A. I consider that in obesity if a person is taking something by mouth and writes a testimonial that that preparation has reduced the weight; I consider such testimonials as having no scientific bearing because the patient is not able to determine what caused the loss of weight. They might measure what weight they lost all right.

Assistant SOLICITOR. Is that all, Mr Rennie?

Mr. RENNIE. That's all, sir.

Mr. FAST. No further questions.

Assistant SOLICITOR. Mr. Rennie, is that the Government's case? Does that conclude the Government's evidence?

(Discussion off the record)

Then the Government does not at this time wish to announce that they have closed their case or concluded their proof, we will make an announcement along those lines after lunch, one way or the other.

188 (Whereupon, the hearing was recessed at 1:00 p. m. until 2:10 p. m., on Thursday, January 11, 1945).

AFTER RECESS

Mr. RENNIE. This concludes the Government's case, your Honor.

Assistant SOLICITOR. Let the record show that the Government has closed its case, and the respondent may now proceed, Mr. Fast.

Mr. FAST. I'll call the respondent, Mr. Pinkus.

Whereupon,

JOSEPH JOHN PINKUS, called as a witness for and in behalf of the Post Office Department and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. FAST.

Q. Mr. Pinkus, you have been sworn, have you not?

A. Yes, sir.

Q. And what is your full name?

A. Joseph John Pinkus.

Q. And what is your occupation?

A. I run a health food store.

Q. Where?

A. At 871 Broad Street, Newark, New Jersey.

Q. How long have you conducted such business?

A. For about six years.

Q. And when did you first sell either "Kelp-I-Dine" or kelp before you went into the "Kelp-I-Dine" business?

189 A. I sold kelp from the very first day I opened up my store.

Q. And have you made any study of kelp?

A. Yes, I made a very extensive study of kelp long before I even called it "Kelp-I-Dine". First I sold kelp when people came in to ask for kelp. Kelp is sold in more than

three thousand health food stores in the country. Every store in the United States that is a health food store sells kelp; some even sell it under various trade names like "Par-Kelp" or ordinary kelp. Then I found that many customers—and women especially, because ninety per cent of my customers are women—used this kelp. I also found that doctors recommended this kelp because it tasted like salt and still did not have sodium chloride in it. At one time a Doctor Bergman, a practicing physician in Newark, asked me whether—

Mr. MANHERZ (Interposing). Mr. Solicitor, Government objects to the respondent witness testifying, giving chemical testimony. He hasn't been qualified as I understand it as a chemist yet and he is giving testimony as to the ingredients in this preparation. Without having laid a foundation for such testimony I object to it.

Mr. FAST. I'm not qualifying him as an expert although I think I can.

Mr. MANHERZ. He testified how much sodium chloride was—

Mr. FAST (Interposing). Let me finish here. He is testifying as to how he came to sell kelp and how it was represented to him. However, I shall ask him this question:

By Mr. FAST.

Q. Did you have the kelp analyzed?

A. Yes, I had the kelp analyzed.

190

Q. By whom?

A. First by the Ridgewood Laboratories who made an analysis of my kelp for which I paid the Independent Druggists Association a check, first for \$25.00—I have that check here—and they analyzed the kelp and found that its analysis was almost—

Q. (Interposing) Do you have the analysis?

A. The analysis, yes, is right on the can. Well, it was on the old can; it is not on the present can. But it is the same identical analysis as the Department of Agriculture has found kelp to be.

Q. You have that analysis here?

A. Yes, we have that analysis here. Then—

Q. Wait just a minute—I ask your Honor's indulgence a minute; I had it here.

(Counsel looks for and locates said analysis)

Where did you obtain this analysis of kelp?

A. This analysis that I have in my hand was obtained from the Department of Commerce, Bureau of Fisheries, from Washington, D. C.

Mr. FAST. I offer it in evidence.

The WITNESS. I'm not through, however.

Mr. MANHERZ. Will that be marked Respondent's Exhibit 1?

Assistant SOLICITOR. I think there was some exhibit offered—

Mr. MANHERZ (Interposing). No, he offered several books for identification but they—

Assistant SOLICITOR. You haven't offered anything else yet, have you, Mr. Fast?

Mr. FAST. Nothing other than the books.

Assistant SOLICITOR. And they were merely identified for the purpose which you stated?

Mr. FAST. Yes sir.

Assistant SOLICITOR. Well, let this be marked Respondent's Exhibit 1, please.

(Sheet containing mimeographed analysis of kelp under letterhead of Department of Commerce, Bureau of Fisheries, Washington, marked Respondent's Exhibit No. 1, was offered and received in evidence).

By Mr. FAST.

Q. Go ahead, Mr. Pinkus.

A. I also analyzed kelp in the organic chemistry class which I took under Dr. Reed, at Montclair State Teachers College, and found that I am practically in agreement with the chemist who testified here that one-half teaspoonful of "Kelp-I-Dine" contains .3 milligrams of iodine. The chemist yesterday, I believe, said .4 milligrams of iodine.

Q. Now, is "Kelp-I-Dine" and kelp synonymous words?

A. Yes. "Kelp-I-Dine" is pure kelp known as fucus and bladderwrack in dictionaries and as kelp. "Kelp-I-Dine" has nothing added to it, nothing taken away, and it is just pure granulated kelp which is sold in more than three thousand stores in the United States.

Q. In what school did you say you had this analyzed?

A. I analyzed at Montclair State Teachers College in a course that I took in organic chemistry, an advanced course, with the aid of Dr. Reed who is a professor at Montclair State Teachers College and was professor there for at least fifteen years.

Q. How long did you take that course?

A. I took that course for one full year, that is, at Montclair State Teachers College. I also took inorganic chemistry at Montclair State Teachers College—and
192 organic. It is in this class on organic chemistry I

analyzed kelp with the aid of another student and the professor.

Q. Is that a recognized college in New Jersey?

A. Yes. Montclair State Teachers College is a state teachers' college maintained by the state and its courses are recognized in other universities throughout the country.

Q. Before you became engaged in the business of selling "Kelp-I-Dine" and Dr. Phillips' menu, did you discuss the thing with any doctors?

A. Yes, I did. I have several friends who are practicing physicians, members of the A. M. A. I asked them a number of questions because I want to know as much about the products I sell as possible. I wanted to know if kelp contained any iodine and they assured me it did. I wanted to know, too, whether if I gave one-half teaspoonful of kelp would it be considered a dosage that medical authorities would agree would aid obesity, and they said "yes".

Mr. MANHERZ. Mr. Solicitor, of course I object to this hearsay testimony. As far as I am concerned he can testify that he discussed it with doctors but he can't say what the doctors said. Unless he produces the doctors here, I move that his answers on that phase of the thing be stricken. It is pure hearsay.

Mr. FAST. I think that in proceedings of this kind he has a perfect right to say what he learned and how he learned it. I don't know that that goes in as evidence of the doctor, but it certainly goes in as evidence of his studies of what he is selling and how he came to sell that. This is a fraud proceeding.

193 Assistant SOLICITOR. The only purpose of such testimony could be for the purpose of good faith in the transaction. Now we try not to be too technical in these proceedings here in the Department; but, nevertheless, when there is an issue which cannot be decided without the help of expert testimony, it seems that it is fair to both sides that hearsay testimony not be admitted, in other words, what a doctor might state to him when the doctor isn't here on cross-examination—the doctor's statement might be limited—I am not saying it was—I am merely stating what it might be.

Mr. FAST. Well, you see here you have a charge that we have falsified our ads by saying that doctors approved. I think your statement here is that we said *all* doctors approved, which of course we never said. But where that comes

in I have a perfect right to show that doctors did agree that this "Kelp-I-Dine" plan was a good one.

Mr. MANHERZ. Not, Mr. Solicitor, through hearsay testimony, though. He has a perfect right to produce proof if he has such to establish that claim, but to produce hearsay testimony is certainly not proper under any circumstances.

Mr. EAST. I don't offer it as testimony as to the property values contained in kelp or "Kelp-I-Dine". I offer it to indicate that we have discussed this situation with doctors which is one of the charges made against us.

194 Mr. MANHERZ. Mr. Solicitor, of course the fact that he has discussed it with the doctors is within the knowledge of this witness, and if he testifies he has discussed it with doctors, then stop at that, the Government has no objection to such testimony. But when he tries to put in in addition to that a statement that the doctors approved, that the doctors said it was good for this or that or something else, the Government very definitely objects to such testimony. It is pure hearsay, and if he wants to offer his testimony that he has discussed it with doctors to show his good faith, as I say, we have no objection.

The WITNESS. I'm glad you have no objections—

Mr. EAST (Interposing). That is the purpose of asking the question, sir.

Mr. MANHERZ. Well, I move that portion of his answer concerning what the doctor told him, Mr. Solicitor, from the record.

Mr. EAST. No, it goes in as to the bona fides of his advertising.

Assistant SOLICITOR. Well, the mere fact that he discussed the uses of kelp with doctors would show that he made some effort to get scientific information about it which would be at least helpful in establishing the good faith on his part. But when you let that go into the record as doctors approving it for the treatment of obesity, you are getting into the field of expert testimony. And I don't believe that it is competent because it would be utter hearsay.

Mr. EAST. Well, I'm offering it and if you rule contrary, I'm going to ask your Honor to grant me an exception.

Assistant SOLICITOR. Well, let the exception be noted because—

195 By Mr. EAST.

Q. Mr. Pinkus, did you make any studies by yourself?

A. Yes, I made a number of studies by myself.

Q. Of what did those studies consist?

A. First, the study consisted of analyzing the kelp and finding it to agree with what the chemist said yesterday. Secondly, long before I called "Kelp-I-Dine", before I even conceived of the name "Kelp-I-Dine", I did a great deal of what I call research on kelp and its relation to obesity. Among those things I did was to look in what I considered and what, after talking with doctors, they considered reliable sources of information. But before—

Mr. MANHERZ (Interposing). Now, that is the very thing to which I am objecting. This witness is still trying to put in here the opinions of doctors concerning reliable textbooks—

Assistant SOLICITOR (Interposing). Yes, that should be stricken from the testimony—

Mr. FAST. Let that be stricken.

The WITNESS (continuing). Before I considered any book authoritative on its information as to what kelp or fucus will do, I first made sure that the authors had at least a medical degree. Secondly, I also looked into the date the book that I am looking into was published—I looked at that. I didn't want to offer or I didn't want to take as true anything that was published twenty-five or thirty years ago. I wanted my information to be as up-to-the-minute as possible. Not only did I rely upon one source of information but I tried to get as many sources as I
196 possibly could to substantiate those claims and only reliable sources and I just stated what I considered reliable. I went to many sources, and here is what I found: I found that in Steadman's Dictionary which I had back in 194—

Mr. MANHERZ (Interposing). Mr. Solicitor, of course I am going to object to this witness reading anything, even a dictionary—

The WITNESS (Interposing). I'm not reading anything.

Mr. MANHERZ. —He said he finds in this dictionary, and purposes to read it. I object to that.

Assistant SOLICITOR. Well, he says "I found in Steadman's Dictionary". Even if he gave the substance of what he found, it would be incompetent.

Mr. FAST. Now, if your Honor pleases, the Government's own witnesses gave these books an accredited status—

Mr. MANHERZ (Interposing). Oh, no, Mr. Solicitor, that's—

Mr. FAST (Interposing). Now, wait a minute, please, I don't think we ought to answer each other in the middle of an argument. The last Government's witness definitely said that these dictionaries are used in medical schools, and I think the first witness said that he himself used one of these books. Now, after all, in going into the bona fides of a transaction you must go behind the man's mind; what did he do; why did he do what he did. And I think that under those circumstances books whether dictionaries or otherwise have the right to be used in evidence.

Assistant SOLICITOR. I disagree with you sir. I think that he may testify—go so far on the ground of good faith—he may testify that he did examine medical books. But
197 as to stating what the contents of those books were or introducing those books into evidence for the purpose of contradicting the testimony of the Government's expert witnesses, I cannot hold them competent.

Mr. FAST. Then I shall ask your Honor to grant me an exception.

Assistant SOLICITOR. Let the exception be noted.

By Mr. FAST.

Q. You made a personal study did you of kelp and the value thereof?

A. Yes sir, I made a personal study of it.

Q. As a result of that study to what conclusion did you come?

A. I came to the conclusion that I must agree with what I have found authorities say that when you take .3 milligrams of iodine—

Mr. MANHEZ (Interposing). Mr. Solicitor, I again must object to this witness trying to testify as to what authorities say and he is now attempting to do that very thing. A previous statement made along the same lines was recently stricken and instead of continually objecting I think the witness might refrain from trying to put in expert testimony.

Assistant SOLICITOR. Well, I'll have to sustain Government's objections, Mr. Fast, because this witness at least by anything stated so far has in no sense qualified as an expert medical witness.

Mr. FAST. He is not a medical witness.

Assistant SOLICITOR. Well, then might a layman who has read a few medical books come into court or into a hearing of this kind and give medical testimony?

Mr. FAST. Yes, as to certain parts—not as to all medicine—I only found that yesterday in the library right

198 here in the building, and I have got that citation here if you want it. It is in 32 *Corpus Juris Secundum* 575.

Assistant SOLICITOR. What was the statement of the court in substance in the case?

Mr. FAST. It was a statement in the *Corpus Juris* that even a layman may testify with regard to a scientific situation where he has made a study of it.

Assistant SOLICITOR. On the other hand, I don't know that he will testify one way or the other on this; but has he treated, has he made scientific experimentations, or is he capable of making scientific experimentations to determine the value of kelp?

Mr. FAST. Well, I shall withdraw the questions and try to qualify him as to that.

Assistant SOLICITOR. All right, sir.

By Mr. FAST.

Q. Have you made any study of foods and kelps in schools and otherwise?

A. Yes, I have.

Q. At Montclair State Teachers College under Dr. Reed, we have analyzed such things as oranges to determine how many units of Vitamin C is in an orange. We have had experiments conducted there analyzing a great many foods to determine each of the elements that we were looking for and their amounts in that particular food. In addition to that I did some experimental work in chemistry when I took inorganic chemistry with Dr. Reed. I did experimentation with live animals at the Kirksville College of Osteopathy in Missouri where I attended as a student.

199 Q. How much of that work did you do in Kirksville?

A. Well, at least four to six hours per week with directly connected experimental lab work at Kirksville, Missouri, for the time I was there.

Q. While you were there did you make any tests with regard to iodine or kelp?

A. While I was there with whatever help I could muster I tried to determine whether kelp with the amount of iodine you get in a half teaspoonful—as our friend testified yesterday—whether that would have any effect on the metabolism of a person. And I found that—

Mr. MA IENZ. (Interposing) Mr. Solicitor, the witness is again trying to inject into this thing certain scientific findings. He hasn't qualified himself yet as a person capable of making such experiments.

Assistant SOLICITOR. Let the witness for the time being limit his statements to such training as he has had, but stating no conclusions he may have reached until it is determined whether he has qualified as an expert along any scientific line.

By Mr. FAST.

Q. Tell us, Mr. Pinkus, of what your studies consisted along these lines?

A. My studies consisted of reading books that college professors had put up as reliable sources of information, and reading those particular books. My studies also included the asking of people who have used kelp their opinion of what they thought it included. My studies also included of asking both medical doctors and doctors 200 who have a PH. D. what the effect of kelp is on metabolism: whether iodine, for example, would increase metabolism or not. They referred me to a great many books such as the—

Mr. MANHERZ. (Interposing) Mr. Solicitor, this is also—

Assistant SOLICITOR. (Interposing) He isn't quoting—

Mr. MANHERZ. —there's no testimony—

Assistant SOLICITOR. I'll have to disagree with you, Mr. Manherz; he is not stating any medical conclusions; he is merely stating right now what qualifications he may have to give testimony. He is not giving any testimony.

Mr. MANHERZ. I withdraw the objection.

A. (continued) They referred me to such books as the Nutritional Handbook by the A. M. A.; they referred me to many medical dictionaries; they referred me to the varied dispensaries of the United States; they referred me to what some people call the Bible of a great many medical colleges and that Bible I call Merck's Index, nothing religious in it. The National Formula was referred to me; the Pharmacotherapeutics Materia Medica and Drug Action was referred to me; Gould's Medical Dictionary was referred to me. In addition to that they had me consult with physicians who made a specialty of treating obesity cases. Remember, this was long before "Kelp-I-Dine" ever existed as "Kelp-I-Dine". It was when I merely sold kelp to doctors, and when I sold kelp to people who came into the store who asked for it. Wanting to know what they used it for, I asked them.

201 And I did that only with one purpose: so that I should know more about the products I sell. And all of these testimonials from doctors—listening to them—and

from professors and from reading reliable medical source books, all agreed as far as I could find—and after using more than a dozen of these reliable books—that iodine has a definite relationship to increasing the metabolism of a human individual—

Mr. RENNIE. (Interposing) If your Honor please, I object to the witness stating—

Assistant SOLICITOR. (Interposing) I sustain the objection and evidence will be stricken from the record.

Mr. FAST. I ask your Honor to grant me an exception, please.

By Mr. FAST.

Q. Well, you—what else did you do?

A. In addition to that, I tried to determine as far as I could what authorities say is a therapeutic dose of fucus in the treatment of obesity.

Mr. RENNIE. If your Honor please, I would like to state at this time that the witness is not yet qualified as an expert and his testimony is at this time not admissible, and until he so qualifies testimony given—

Assistant SOLICITOR. (Interposing) I'm considering his testimony, Mr. Rennie. When he states that he tried to find out what a therapeutic dose of fucus was, I'm only considering that testimony as his search for knowledge which might go or might not go to qualify him as an expert. He can testify that he asked questions about the therapeutic doses of fucus without stating what he learned those therapeutic doses to be until he is qualified as an expert.

202 Now, the qualifying as an expert is a preliminary matter and the witness will please confine his answers strictly to the question of what he did to gain the knowledge without stating what his views or opinions are pertaining to "Kelp-I-Dine", until it has been ruled by me one way or the other that you are or are not qualified as an expert witness to give expert medical testimony. Now, proceed along those lines. I think you understand, but I don't think the witness does.

The WITNESS. I would like to ask your Honor: Would a certain amount of schooling qualify me as an expert?

Assistant SOLICITOR. I won't rule on that until we come to the proper place to do that. You tell what schooling you have had.

By Mr. FAST.

Q. Now, what other investigations did you make and schooling did you have which would enable you to tell us about kelp and its efficiency?

A. In addition to that schooling I took a course with Dr. Reed again in the Chemistry of Foods, an entirely different course from the organic chemistry course. In the Chemistry of Foods we went into a detailed study of every element that the body requires and what its effects were on the body—

Mr. MANHERZ. (Interposing) Mr. Solicitor, I object to that. This man is not a physician; he doesn't know what the body requires—

Assistant SOLICITOR. (Interposing) Mr. Manherz, he hasn't yet stated a word as to the effects of "Kelp-I-Dine" or the effects of any other medicine. He has merely
203 said he went into a detailed study, and that is a preliminary matter and we are now going into the preliminary matters. He hasn't yet stated any preparation but its therapeutic effects of. Now, until he makes a statement like that—he may state what studies he has made. Then I can determine whether or not he is qualified to state what he has learned from those studies.

A. (continuing) Under the direction of Dr. Reed who is a Ph. D. and professor at Montclair State Teachers College, I studied the effects of iodine on metabolism and also its possible effects on the treatment of obesity. In addition to studying that, in studying chemistry I was always in a search in all my other chemistry classes for iodine and what it could possibly do. I got the help of the physiologist, a medical doctor at Kirksville, Missouri, as far as giving me as many conferences as I could possibly obtain from him in his free time relative to iodine, relative to obesity, relative to metabolism. I gave metabolism tests and watched them being taken at medical school, that is, at the Kirksville College of Osteopathy. While I was there we tested one of the students and gave him a basal metabolism test. We had to do a great deal of reading on basal metabolism. In addition to that we were asked a number of questions, as how the basal metabolism machine worked, how the charts worked, what they meant at the curve when up of the curve went down, when the basal metabolism tests should be given, what are the best times to give a basal metabolism test. We also studied and were assigned to make a great many readings on what metabolism will do. I followed as many of these readings as I possibly could. I tried to find out what diet would have to do with metabolism: if overeating the day before or just before,

204 whether that would have anything to do with metabolism. I tried to find out whether a person just eating a normal diet in which she neither gained or lost, and took a metabolism the next day, what that would do. And then that same person under those same conditions, if he took iodine with it, what would that do? I tried to make these determinations honestly. I tried to also determine what constituted a reducing diet. I tried to determine—and we had to know in our examinations—how many calories were necessary for a person with normal work, for a person who did a lot of work, for a person who had a sedentary position—how many calories he should have. I also studied as many outside books as I could get. In order to make myself better qualified to know about these things and the nature of my statements and the facts that I had were very reliable, I looked through every source book that I could while using the library at Kirksville College of Osteopathy. I employed the help of as many medical doctors as I could on the subject in my own city. I asked a licensed physician to write me up what he would consider a reducing diet with the use of kelp—

Mr. RENNIE. (Interposing) Objection, your Honor.

Assistant SOLICITOR. He is not telling what the diet is. If I make myself clear, he is now stating that he talked to the doctor and he is trying to tell what he has done to enlighten himself upon these subjects. He has merely said that he went to the doctor and discussed it with the doctor. He is not yet telling you what the doctor said.

205 Mr. RENNIE. I submit, your Honor, that that throws no light upon the witness's expertness or lack of expertness, the fact that a doctor may or may not have drawn up a reducing diet for him.

Mr. FAST. I haven't asked him anything yet—

Assistant SOLICITOR. I don't know that anything—and I'm not ruling yet—that anything that this witness has said qualifies him as an expert witness, but he is telling us what studies he has made and what inquiries he has made and then when he is through, Government counsel may, if he wishes, it being a preliminary matter, cross-examine him as to his qualifications prior to his giving testimony as an expert if it is admitted as such. So, I think it is competent to ask him and for him to give his answers about what efforts he made to enlighten himself upon this subject. Is there anything else, now, Mr. Pinkus?

The WITNESS. Yes, I had some more to add. In addition to what I just said, I became very much interested in obes-

ity and whenever I met anyone who was overweight I discussed their problems of obesity with them, to have them give me or tell me what they were doing about their being fat. I found one girl who gave me—

ASSISTANT SOLICITOR. Now, wait just a minute, Mr. Pinkus. Don't tell us any of your experiences. You can refer to the girl, but don't tell us what the girl said or what treatment she was taking.

MR. FAST. You must tell us—I am anxious to find out what your preliminary education was along the line of metabolism, weight reduction, and things of that kind.

206 THE WITNESS. Yes. I was a science major at Montclair State Teachers College. That was during my second year of college. My first year of college was in Dana College, what is known as the pre-legal department of New Jersey Law School, at that time called Dana College. I spent my first year there—

MR. FAST. You are wrong. I thought that there was a law school connected with the college—

THE WITNESS. (Interposing) Connected with it—

MR. FAST. —Dana College was separate—

THE WITNESS. —Dana College was separate. There I took courses in psychology and in psychology I was very much interested in the biological side of psychology. I also took a course there in geology and the other courses, of course, were not related to obesity or even science excepting a course in geology. After that first year of college I had, I went to Montclair State Teachers College where I was a science major and took courses in biology. While there I had opportunities to talk with my professors and ask them as many questions as I could about metabolism, iodine and its effect on a person living on a normal diet that would just maintain his weight, and iodine as a cure for obesity. Then I went to New York University. At New York University I got my B. S., that's Bachelor of Science in Business Education. But in order to get a B. S. in Business Education I had to take some science there: not extensively, but some science. After that I went to Columbia University for two years to get my Master's Degree. I was teaching high school at the time. I got my Master's Degree in what you would call "secondary education". While taking secondary education, I took
207 a course in Methods of Teaching, and in Methods of Teaching I was very much interested in consumer education and geographical education and I wrote a 105-

page typewritten booklet on the teaching of commercial geography, and where different elements come from, what California was noted for, where seaweeds come from, where silk comes from, and other matters like that. After that I took a summer course with Dr. Nichols at Harvard University and that course was in Consumer Education. The phase of Consumer Education that I concerned myself most with was food. While there I looked up as much as I could about food and its relation to being overweight. I always felt that there were too many overweight women in this country, and I always felt that it would be healthier for a person to be normal in weight at least than to carry around a great deal of excess weight. After that I went to Kirksville, Missouri, where I was a medical student and did the work there that I described previously. After that I spent a full year at Montclair State Teachers College where I took courses in science almost exclusively. My courses were biology, physiology, inorganic chemistry, organic chemistry, the chemistry of foods. That gives me one year at Dana College, one year for my second year of college at Montclair State Teachers College, four years at N. Y. U., two years at Columbia, some time at Harvard—that is, a summer session at least, another full year at Montclair State Teachers College, plus a semester's work at Kirksville, Missouri.

Q. Well, you don't mean to imply do you that all of these subjects that you took at Columbia or N. Y. U. had anything to do with it? With food?

208 A. No, not every subject I took had to do with food.

You couldn't get a degree that way, and I wasn't even a major in science. But I did take enough science courses to be admitted to a medical school. I took more than eight points of physics, more than eight points of chemistry, more than eight points of biology.

Q. And by medical school you mean the osteopathic school, don't you?

A. To be admitted to any medical school—osteopathic or a straight medical school like any first rate medical school in the country. I have enough education to be admitted as a medical student. That is, I have passed recognized courses in the field of language, in the field of biology and in the field of chemistry, plus having enough college point requirements to enter me as a medical student in any medical school.

Q. Well, Mr. Pinkus, as a result of all of this education, did you learn the efficiency of kelp in connection with obesity?

A. Yes, I have learned the amount of kelp necessary to take to cause or to be considered a therapeutic treatment. I didn't say what that amount was, remember. But just the amount that would be considered a therapeutic treatment in the treatment of obesity, I learned what that was. I knew what that was before I ever dreamt of calling kelp, which I had been selling and which other stores always sell—before I even thought of putting "Kelp-I-Dine" on the market—before I ever sold "Kelp-I-Dine" or kelp as "Kelp-I-Dine". I knew all the information and had all the education and made all the tests and asked as many

209 doctors and asked as many patients as I knew were being treated by doctors for obesity. I was particularly on the alert to find two things: One, what doctors were doing for patients; to find his patients and find out how the doctor was treating him; what kind of diet they were getting; were they getting any thyroid; were they getting any benzedrine; were they getting any kelp preparation; how many calories did they have in their diet; what diet were they following. I also tried to find out who was getting good results and who wasn't from people who came into my store who told me they were being treated by doctors. I even had an interview with one doctor in my town who is considered—that is Dr. Kalb (?)—who is considered an expert in the field of reducing and discussed "Kelp-I-Dine", or rather kelp at that time, with him. He asked me whether in my store that I sold vegetables and other things whether I had any food that would taste salty but wouldn't have as much salt in it, or wouldn't be as bad for a fat person as taking ordinary salt. That was the question he asked me. And I said, yes, we had vegetable salts that you could mix together without even containing kelp that would be vegetables that would taste salty—

Mr. FAST. (Interposing) That wouldn't help us.

Assistant SOLICITOR. (Interposing) That wouldn't help your qualifications, Mr. Pinkus.

Q. Now, did you look in any medical books?

A. Yes, all during that time I had these discussions with doctors and I had these discussions with patients being treated with doctors—

Assistant SOLICITOR. (Interposing) You have gone into that.

210 Q. (Interposing) Now, what medical books did you examine?

A. One medical book that I examined was Steadman's Medical Dictionary. That book I bought while I was a

student at Kirksville, Missouri, and I was told that it was a reliable book and should be by me in my studies—in my studies of medicine.

Q. And what other books did look in?

A. I was also was urged to look in Merck's Manual. I was also urged to—

Q. I don't care whether you were urged or whether you weren't.

A. —I was asked to look into every medical dictionary I could find, every handbook on nutrition I could find, every medical book that treated with the different ailments a person may have; and always in addition to doing the homework that I had to do for these courses, I was always interested in obesity.

Q. Well, now, I am trying to get these books in evidence. I am not interested in what you did in extra time.

A. I looked in Steadman's book; I looked in Gould's Medical Dictionary which was suppose to be reliable; I looked in the Pharmac-Therapeutics Materia Medica; I tried to get as many handbooks on nutrition published by the A. M. A.—

Q. (Interposing) Tell us which ones you looked at.

A. I looked at Pharmacopeia Materia Medica. I didn't look at the Handbook of Nutrition until—well, until it was published and that was in 1943—I think it came out early in '42. I looked at the National Formulae, the 5th edition of the American Pharmaceutical Association, and, as I said, Merck's Index, and whatever other books that were available at the time. I looked through dispensaries; I looked through books on obesity, and—

Q. (Interposing) Well, have you continued looking in the later editions of these books, too, to see if there is any change?

A. Yes. I have looked in these later editions. I've looked for one reason—

Q. (Interposing) You've answered my question.

A. (Interposing) Yes, I have, as late as 1944.

Mr. EAST. I now desire to offer again into evidence Steadman's and Dorland's for the present. I can presuppose what your Honor is going to rule, but I want to offer them again for this reason: That the witnesses for the Government have discussed in their testimony the reliability of these books, and since they are standard dictionaries in the medical profession I think they are evidential.

Assistant SOLICITOR. They were discussed, though, by the witnesses strictly on cross-examination, sir. They were

not stated by the witnesses as the source of any of their opinions or the basis of any of their opinions, and I'll have to make the same ruling, Mr. Fast.

Mr. MANHERZ. I object, of course. Government objects, of course.

Assistant SOLICITOR. Well, I anticipated that.

Mr. FAST. I did too.

Assistant SOLICITOR. I took it for granted. I make the same ruling, Mr. Fast.

Mr. FAST. I'll ask for an exception.

By Mr. FAST.

Q. Now, do you have with you the original letters from the various doctors who have certified about your product?

212 A. Yes. Before—

Q. You have answered—

A. Yes, I have those doctor—

Mr. FAST. I desire to offer them in evidence.

Mr. MANHERZ. Mr. Solicitor, we object, of course.

Assistant SOLICITOR. Let them be submitted to you first and you examine them.

(Government counsel examines said letters.)

Mr. FAST. We offer these in evidence because as a result of these letters we made the representations in our advertisements.

Mr. MANHERZ. The Government objects to the introduction of these purported to be letters in evidence. In the first place, they are not original letters. In the second place, even if they were originals, the Government objects to them because the persons who allegedly made them are not here for cross-examination and in that way they are nothing more than hearsay evidence.

Mr. FAST. Well, for the purpose of the record I desire to offer the original letter sent by Dr. Charles V. Craster to the American Healthaids Company; a letter of Ralph "To Whom It May Concern", dated December 14, 1943; an original letter from Dr. David Robins, "To Whom It May Concern"; and Dr. Phillips' letter. The purpose of offering these letters in evidence is to show an honest effort on the part of this witness to be advised by members of the medical profession with regard to the product which he has sold and which is the subject matter of this inquiry.

213 Mr. MANHERZ. Mr. Solicitor, while that may be the purpose of the offer of these letters, they not only allegedly show that but they go further and in that way

attempt to get medical testimony in when the witness who is supposed to have signed these letters is not here to be cross-examined.

Assistant SOLICITOR. Well, now, Mr. Fast, the record already shows that you have offered these letters in evidence and the record therefore shows that this witness obtained letters from doctors concerning his product. Now, that will be evidence of his good faith in the transaction. But I can't admit the letters which are the statements of doctors even though over their signatures because they would be hearsay evidence. There is no opportunity for cross-examination and if we relaxed that rule here in the Department it would make no end of trouble for us.

Mr. FAST. I ask your Honor to grant me an exception.

Assistant SOLICITOR. Yes, let it be noted.

By Mr. FAST.

Q. Now, I should like to know whether you contacted any of the Government agencies before you put this product on the market?

A. Yes, I have.

Q. What agency?

A. When I first was selling "Kelp-I-Dine", I intended its use, well, perhaps as advertised—

Q. Now, just tell us—

A. What agencies? The War Production Board.

Q. And who did you see there and for what purpose?

214 A. I wrote the War Production Board for a classification of "Kelp-I-Dine", and I wrote them so that I could determine whether or not they would classify it as a food. I wanted it classified some way so that I should be able to get such things as paper or tin or other things that might enter into the packaging of my product.

Q. Did you tell them what you were going to send out?

A. Yes, I told them I was going to send out "Kelp-I-Dine" and I sent them a sample of "Kelp-I-Dine". They acknowledged receipt of that sample.

Q. And did you show them the form of advertisement you were going to use?

A. No, I just showed them the "Kelp-I-Dine" and told them how a great many people were using it. I told them that people were using it in place of salt; that people were using it as kelp; and I sent them a sample of my product for classification.

Mr. RENNIE. If your Honor please, I don't see what this has to do with the expertness of the witness.

Mr. FAST. It has nothing to do as an expert.

Assistant SOLICITOR. Well, now, I announced though—I see Mr. Rennie's point—I announced that whether or not this witness was qualified to give expert medical testimony was a preliminary matter to be decided before he gives any testimony on the subject of the efficacy of the kelp. Now, if you intend to offer him as a witness on the efficacy of kelp, as a food or as a drug or whatnot in the treatment of obesity, I think we should determine that question right now.

215 Mr. FAST. I interrogated him and expected to introduce in evidence the books that were mentioned by him and which offers have already been made and already refused. That was the only purpose of my having him tell you of what he has done, and I wasn't going to have him give any medical testimony at all. What I was going to have him do was to show that as a result of his studies and the examination of these books, which were proffered in evidence and which were denied as evidence, indicated not only its bona fides but also testimony that your Honor should have in determining the issues of this case—specifically the dictionaries which have been classified as standard works. Now, I don't say that these witnesses for the Government said that they believe in what was in those books, but the Government witnesses did say that these books were standard works. I think your Honor ought to—

Assistant SOLICITOR. They haven't said though that their contents should be equivalent to expert testimony. They haven't said that—

Mr. FAST. (Interposing) No, they—

Assistant SOLICITOR. — then the doctor—and I don't think either doctor said that he would accept what was in those books as determinative of the issue of the effectiveness of kelp.

Mr. FAST. Your Honor, what difference does it make what they said about that as long as they said these were standard works?

Assistant SOLICITOR. They said they were standard for certain purposes, and limited purposes. Particularly, Dr. Norris said for limited purposes.

Mr. FAST. Yes, Dr. Norris did, but the doctor yesterday didn't. As a matter of fact he said he has got one of them, I forgot which one.

Assistant SOLICITOR. Well, he would use it as a dictionary, but he has never said that he would accept what was in there

concerning kelp. He never testified that. He said it was standard medical dictionary. Beyond that he did not go.

Mr. FAST. I certainly didn't expect any help from Government witnesses and I'm not expecting it now. But I do think that they have laid a sufficient foundation for these books to be offered in evidence. And I was going to offer them, if I couldn't have offered them earlier. I was going to offer them through Mr. Pinkus who made the study.

Assistant SOLICITOR. Well, I must disagree with you with all respect, sir.

Mr. FAST. Yes, you may be right; I don't think you are, but you may be. I mean I say that in all deference. I think I have found some authority which enables us to put it in.

Assistant SOLICITOR. I disagree with you with all deference, too, sir, but I have to disagree with you. And now—

Mr. FAST. (Interposing) I don't know why that came up now. I was all finished with that phase of the case.

Assistant SOLICITOR. The Government first, if you recall the sequence in the events here, the Government first objected to his making statements concerning the effectiveness of kelp or "Kelp-I-Dine" unless he were qualified as an expert witness. Then he went extensively into his studies over the years at various schools, and his methods of gathering information from doctors and such. I assumed

217—that that was for the purpose of trying to qualify him to give such testimony. Now, if you don't wish to pursue that and don't seek to qualify him as an expert, well then we will let the record so show that you don't seek to qualify him as an expert medical witness.

Mr. FAST. No, I certainly do not attempt to have him act as an expert medical witness. I was going to show how in his studies he came across medical works—

Assistant SOLICITOR. (Interposing) Well, it is in the record and it may be—

Mr. FAST. (Interposing) That's what I wanted to get into evidence and as long as your Honor indicated that I couldn't there was no use of my going through with it. Now, I am trying to show that he went to various departments of the Government as a further effort to indicate his bona fides.

Assistant SOLICITOR. And you have asked him with regard to the agencies and he told you one, the War Production Board.

Mr. FAST. Told me one, yes, so far.

Assistant SOLICITOR. Now, he may tell you those other agencies and I so rule. No objection has been made. But let him enumerate any other agencies.

57

By Mr. FAST.

Q. (Interposing). Oh, yes. What other departments?

A. Well, after "Kelp-I-Dine" was already in the market, I tried to determine from the Federal Communications Commission whether or not what my advertising agencies were saying about "Kelp-I-Dine" was so or not. So I sent to the Federal Communications Commission a copy of the script that was to be used on a radio program and
218 asked them to comment on it.

Q. (Interposing) And they said—

A. They sent back to me in a letter, the original of which I have here, on September 22, 1944—long before I ever heard from the Post Office—and they—

Mr. RENNIE. Objection, your Honor.

Assistant SOLICITOR. You object to the introduction of the letter or the reading?

The WITNESS. I'm not reading from the letter.

Mr. FAST. Have you any written letter?

The WITNESS. I have the original letter here.

Mr. FAST. I don't believe it will help his attorney. Otherwise, I would be very happy to show it.

By Mr. FAST.

Q. Well, did you go to the Food and Drugs Department?

Assistant SOLICITOR. The letter from the Federal Communications Commission is not offered?

Mr. FAST. No.

A. Before I ever heard from the Post Office, but after I was selling "Kelp-I-Dine" I was once before the Food and Drug Administration because they took some exceptions to my label, and then I changed it to what it now is and then they told me that after I submitted the label to make one little change which I abided by just as soon as they said that they had no other comments to make on my label. And they sent me a letter to that effect. And they agreed with me—

Q. Do you have that letter with you, the original?

A. Yes, I have that.

219 Mr. FAST. That I offer in evidence.

The WITNESS. That is, the photostatic copy.

Mr. FAST. You want the original? (To counsel): You have my word this is a photostatic copy.

(Copy of letter was handed to Mr. Manherz for comparison.)

(Discussion off the record.)

Mr. FAST. I desire to offer in evidence a letter dated July 3, 1944, over the signature of A. W. Crawford, Assistant

Commissioner of Food and Drugs, (letter dated to Joseph John Pinkus.

Assistant SOLICITOR. Any objection on behalf of the Government?

Mr. MANHERZ. I see no objection to it.

Assistant SOLICITOR. Let the letter be admitted as Respondent's Exhibit 2.

Mr. FAST. I don't know the practice here. I have sufficient copies if you want to copy it into the record.

Assistant SOLICITOR. Would you prefer, Mr. Fast, to keep the original? Could not the photostat be inserted in the record?

Mr. MANHERZ. Mr. Solicitor, I'm sorry, but the Government does object to the introduction of this letter for the reason that it doesn't constitute the complete facts surrounding this transaction. It is very apparent from the last paragraph that there have been other letters and correspondence and matter considered by the Food and Drug Administration before they wrote this letter. So, unless we had it all here and was all offered as part of the exhibit, I'm afraid that this particular letter, or photostatic copy
220 of the letter, would not serve any useful purpose. So, therefore, I must object to it unless the complete and full files involving this particular transaction are offered as a part of the exhibit.

Mr. FAST. I shall take no advantage of the Government's position a few moments ago when they admitted in evidence. I do want to say, however, that it does not appear that there have been any other letters in the file. I would like counsel to point out to me just what sentence indicates there have been.

Assistant SOLICITOR. Does the letter from the Food and Drug Administration do anything more than approve the label?

Mr. MANHERZ. Yes, Mr. Solicitor. It refers to a supposed circular which is not a part of this file and we haven't the circular here. So, unless we have the circular we couldn't tell whether or not the Food and Drug was approving—what circular they were approving.

Mr. FAST. Well, I suppose Mr. Pinkus must have a copy of it. We certainly don't have your files. How can you ask us to introduce something that you ought to have in your files?

The WITNESS. They say they have no objection to the circulars, do they?

Mr. MANHERZ. Mr. Solicitor, we haven't the circular here, so we don't know what circular he has in mind. He testified he had several circulars, and when they did have some exception he changed it promptly. So until we see the circular he is referring to, I'm sure that this letter wouldn't be of any value.

Mr. FAST. Well, now, I'm going to ask—my next question will be what the circular is. You can't ask us to produce something that you have.

221 Assistant SOLICITOR. Well, can you put in by secondary evidence what that circular was though, Mr. Fast?

Mr. FAST. Not by secondary evidence, of course not. But we are going to—it is a circular—we are going to show these circulars, copy of the circulars. The original would be had by the Government. We don't have them, because we don't have the one we sent them. We have our own copy, of course. You see what I am offering in evidence is a letter sent by the Food and Drug Administration to Mr. Pinkus. Of course, I mustn't say what it refers to except that in a general way you can get in this discussion it refers to a circular. I am going to ask Mr. Pinkus to produce the circular—a circular similar to the one which he sent to them.

Assistant SOLICITOR. Well, let him produce that and you may offer it and submit it to Government counsel.

Mr. MANHERZ. I might state, Mr. Solicitor, one further thing that the letter refers to a label and there is no label attached to the letter in addition to the circular. So we can't tell what label the Food and Drug Administration was referring to.

Mr. FAST. That has nothing to do with the memorandum, the specification, the memorandum that has been filed by the Solicitor. We have a perfect right to explain by any evidence that we have at our command what was meant in Mr. Crawford's letter. As a matter of fact, we have the copies here and we will be very happy to introduce them into evidence. I don't want to hide anything. This letter from the Food and Drug Administration refers to a leaflet
222 and a revised label. Do you have the label and the leaflet, sir?

The WITNESS. Yes, I have the labels here.

Mr. FAST. Now, just tell us which is which. Which is the label referred to in the letter of July 3 from Mr. Crawford to you?

The WITNESS. These are the labels referred to. They refer to taking this label and to having it changed to this one, the lighter colored green now used.

Mr. RENNIE. If your Honor please, may I just make one suggestion? This is going on the record, and I think if you will mark the cans so they can be identified if they are offered.

Mr. FAST. Thank you very much. This is the label they wanted changed?

The WITNESS. Changed to this.

Mr. FAST. Now, I am going to offer in evidence a can with a label thereon. I'll offer it as Exhibit 2-A. And the one to which it was changed as the result of the suggestion of the Food and Drug Administration, 2-B.

Assistant SOLICITOR. Then that will be Respondent's Exhibit 2-B as offered.

Mr. FAST. Now, this goes in as 2, is that right (Referring to letter)?

Assistant SOLICITOR. It has been so identified, yes.

Mr. MANHERZ. That is the one I objected to, Mr. Solicitor.

Assistant SOLICITOR. I understand, yes.

Mr. MANHERZ. I don't think there has been any ruling on that, has there?

Assistant SOLICITOR. Not yet, no.

Mr. FAST. Was any other letter or statement or advertisement sent to the Food and Drug Administration in connection with any letter to which this July 223 letter is an answer?

The WITNESS. Yes.

Mr. FAST. What was that?

The WITNESS. There were included in the circular, which they say they see no objection to, a circular on a yellow paper which contained a diet.

Mr. FAST. Do we have it? That was marked in evidence, wasn't it?

The WITNESS. We don't have that particular one here. But it is the same diet that Dr. Phillips' "Kelp-I-Dine" diet is. That was the one that they referred to, except it was a different color and didn't have the additions on the right.

Mr. FAST. And had nothing else on it except—

The WITNESS. (Interposing) Had nothing else on it excepting the diet and ways of using "Kelp-I-Dine".

Assistant SOLICITOR. Well, submit the labels, rather the boxes with the labels on them. Government counsel has seen the letter; submit the boxes to Government counsel, please.

and let them examine them and if they still object I'll rule on the objection.

(Government counsel examines boxes in question.)

Mr. FAST. Do you want to say anything counsel about the offer?

Mr. MANHERZ. Mr. Solicitor, we still object to the introduction of the letter—photostatic copy of the letter—
224 from the Food and Drug Administration for the reason that all of the papers with the file are not included as a part of that offer of exhibit. And I don't see that the picture would be full and clear unless all of the papers and the circular mentioned in there particularly were offered as a part of the exhibit.

Assistant SOLICITOR. They say, Mr. Manherz, that the diet was the only thing that was referred to in that letter.

Mr. MANHERZ. Mr. Solicitor, there is a concluding paragraph that refers to another circular and that circular has not been offered.

Mr. FAST. Look at the last paragraph (referring to the witness), what circular is that?

(Witness reads the paragraph of letter in question.)

Mr. FAST. May I clear the record as to that? Will you again tell the Court, please, what was the proposed circular mentioned in the last paragraph of the letter of July 3, 1944, from Mr. Crawford to you?

The WITNESS. The proposed circular is not commented upon in this letter other than to say that—

Mr. FAST. (Interposing) What is the circular?

The WITNESS. That circular says on it—it is a yellow sheet of paper that looks very much like Exhibit 3-H folded in half and it says on the top "Ways of Using Kelp-I-Dine". Then it said "Breakfast" and everything it says on here,
and then it says "Half Teaspoonful of Kelp-I-Dine".
225 Then "Lunch", "Dinner", "Snack" and the coupon.

Mr. FAST. Well, was it just Dr. Phillip's Reducing Plan and the coupon?

The WITNESS. It was just that diet and the coupon.

Mr. FAST. And that's all?

The WITNESS. That's all.

Mr. FAST. It was the whole half-hand side of 3-H, is that it?

The WITNESS. It was about exactly as the left-hand side only of 3-H, folding it in half lengthwise.

Mr. MANHERZ. May I ask him a question?

Mr. FAST. Surely.

Mr. MANHERZ. Was there any statement on that circular referred to in the concluding paragraph of the letter from the Food and Drug Administration—was there any statement on that circular to the effect that this is a reducing diet or treatment or anything?

The WITNESS. No, it just said "Ways of Using Kelp-I-Dine" and it gave the breakfast, lunch, dinner and so on and it showed how Kelp-I-Dine was used on this diet.

Mr. MANHERZ. And no statement about reducing?

The WITNESS. No, there was no statement about reducing.

Assistant SOLICITOR. Was that last answer you made, Mr. Pinkus, true of both the label and the circular—

The WITNESS. (Interposing) Yes.

226 **Assistant SOLICITOR.** —which are referred to in this letter?

The WITNESS. Yes, that is true of both the label and the circular.

Assistant SOLICITOR. In other words, neither one the label nor the proposed circular referred to in this letter of July 3rd from the Food and Drug Administration had any reference whatever to the use of Kelp-I-Dine as a treatment for obesity?

The WITNESS. That's right.

Mr. MANHERZ. Or as an adjunct to the treatment of obesity?

The WITNESS. That's right.

Assistant SOLICITOR. Or as an adjunct to the treatment. In other words, they never mentioned it in connection with a reduction in weight treatment.

The WITNESS. Yes, you are right. They never mentioned it.

Mr. MANHERZ. Mr. Solicitor, in view of that fact Government withdraws any objection to the photostatic copy of the letter from the Food and Drug Administration and the two cans of Kelp-I-Dine offered by the respondent as Exhibits 2, 2-A and 2-B.

Assistant SOLICITOR. Well, that takes the pressure off the Hearing Officer. They are in the record.

(Letter dated July 3, 1944, photostatic copy, to Mr. Joseph John Pinkus from Food and Drug Administration, can bearing dark green and white label Kelpidine, and can bearing light green and white label Kelpidine, marked Respondent's Exhibits 2, 2-A and 2-B, respectively, were
227 offered and received in evidence.)

By Mr. FAST.

Q. Did you go to any other board?

A. No, no other board.

Q. Did you show the circulars to any other boards?

A. Yes.

Q. Which one?

A. I showed the Food and Drug Administration that circular—

Mr. RENNIE. Just one minute; which circular are you referring to?

Mr. FAST. 3-C.

The WITNESS. 3-C. I showed them circular S-C and they asked me not to use it. It was informal and they said, "Mr. Pinkus we wouldn't advise you to use that." And I said, "All right, I will stop using it." So, just as soon as I could I stopped using it.

By Mr. FAST.

Q. When did the Department suggest to you that you stop using it?

A. It was during last summer, around perhaps August—July or August they suggested that I stop using it so I stopped using it.

Q. And what did you substitute for it?

A. Well, what I substituted for it was Dr. Phillips' Reducing Plan and occasionally—well that was the only thing that went out with the instructions, "Dr. Phillips KELPIDINE Reducing Plan."

Q. You mean this 3-H?

A. That 3-H.

Q. You sent 3-H out after that?

A. That's right; to take the place of 3-C.

Q. With whom did you speak down there, do you know?

A. I spoke with Mr. Cregen.

Q. Who?

A. Mr. Cregen. Mr. Cregen is the director of the Food and Drug Administration in New York City.

Assistant SOLICITOR. For the record, do you know how to spell that name?

The WITNESS. C R E G E N.

By Mr. FAST.

Q. Did you ever advertise that all doctors approve of the use of the Kelp-I-Dine reducing plan in every case regardless of the age, sex or condition of the user?

Mr. MANHERZ. Mr. Solicitor, I object to the question. I think the literature speaks for itself.

Mr. FAST. Well, we are charged specifically—

Assistant SOLICITOR. (Interposing) But the literature speaks for itself is the position the Government takes. It's a matter of interpreting the literature. You might ask
229 him the question, did he make any other representation in his advertising than those that are in evidence.

By Mr. FAST.

Q. Mr. Pinkus, did you ever make any representations other than those that appear in evidence that all doctors approve of the use of the Kelp-I-Dine reducing plan in every case regardless of the age, sex or condition of the user?

A. I never made such a statement in any of my advertising other than what they have here to show nor did I ever want it to be construed as meaning that all doctors approve—meaning every one under the sun. By all doctors I meant that there are some doctors who do approve. Never in any place did I ever say that all doctors approve. I only said doctors approve because I do have doctors' letters who do approve and it was my intention to say that these doctors, whose letters I have, approve. Doctors meaning plural, more than one. I meant to say that there's more than one doctor who approves it, besides letters from customers who used kelp said that their doctor approved. Therefore, that made it even more than two, three or more.

Q. Mr. Pinkus, did you receive any letters from any of the users?

A. Yes, I received thousands of letters from users who have used Kelpidine. Users have written me of how much weight they lost. Users have written to me as to
230 whether or not their doctors approved. Users have written me whose doctors did approve and users have told me their doctors approved. Not all users but a great many users.

Mr. MANHERZ. Of course, Mr. Solicitor, that statement that users have written to him that doctors approve is objected to. I think he has gone beyond the stage and since counsel stated that he doesn't desire to qualify him as a medical witness I think that is merely an attempt to get in evidence by round about measures.

Mr. FAST. Well, that's his explanation as to why he put these things on his circulars.

Assistant SOLICITOR. Well, he might testify on the ground of attempting to establish his good faith that any testimonials which appeared in his advertising were actually received, if he wished to do that.

Mr. FAST. I sure will. Did you advertise—You put on your ads that you received certain testimonials. Do you have them here?

The WITNESS. Every time I put on my ad that I received a certain testimonial I never used my ad with a testimonial without first receiving that testimonial. Sometimes I would keep that testimonial. Sometimes I would have to give that testimonial to a magazine or newspaper and they would hold it or keep it for themselves otherwise they wouldn't publish my ad. But I received every testimonial that I have ever mentioned in every one of my ads.

231. By Mr. FAST.

Q. Were any of these testimonials solicited by you?

A. I have never solicited any testimonials by mail ever. I have never asked anyone to ever write me how helpful; I have never asked anyone to ever tell me whether they did or did not get results with Kelp-I-Dine. Every one of them usually came to me when they were ordering more kelp. They were so grateful that they sent thanks very much, as a typical one would say, or "Thanks very much for sending me my Kelp-I-Dine I lost a certain amount of weight." I didn't say how much or who sent it. It says, "I have lost a certain amount of weight in a certain given period." Or that they were satisfied, or that their doctor approved, and I used those kinds of testimonials in my letters, that is, in my advertising. I have those typical testimonials, a great many of them, with me. Some of them I would have to give to an advertising agency who would want to keep it otherwise they wouldn't handle my account, or to a magazine or to a radio station. Every radio station, especially the one referred to yesterday in Court, would never quote a testimonial unless they have that testimonial in their hand and in their possession. And many of those testimonials used in the radio script were also used in my newspaper or magazine advertisement.

Q. Mr. Pinkus, who is Dr. Eddy?

A. Dr. Eddy is a Ph. D. Dr. Eddy broadcasts over radio station WOR.

232 Q. What is that the Mutual—

A. The Mutual Broadcasting Station. WOR is the key station for the Mutual Broadcasting system.

Assistant SOLICITOR. Located in New York?

The WITNESS. Dr. Eddy in New York.

Mr. FAST. The station is located in New York?

The WITNESS. Yes. And Dr. Eddy is also a licensed food engineer or nutritional engineer by the State of New York. What he says is usually considered by the public and even by some doctors—after my talking to them doctors to obtain this—he's considered as an expert. Not by all doctors but by some. Not by all people but by a great many. He has a large listening audience in Newark. He also is the president of the American Institute of Foods in New York City. That Institute—

Mr. FAST (Interposing) You mean the American Institute of Food Products.

The WITNESS. Of Food Products. That Institute is supposed to make a complete study of the product and its advertising before it is accepted by them for advertising. Before it is advertised over Station WOR the radio station independently of the American Institute of Food Products makes a careful study of the claims of the advertiser and of the product. Then, after the studies were made my product was accepted for advertising by radio station WOR and by Dr. Eddy and Dr. Bories and
233 the American Institute of Foods. They made quite a study.

Mr. FAST. You may take the witness.

(A recess of approximately one-half hour was taken.)

234 Cross Examination.

By Mr. MANHERZ.

Q. Mr. Pinkus, what was your business before you went into the sale of Kelp-I-Dine?

A. My business was teaching high school at the High School of Commerce, Springfield, Missouri. However, after I taught high school for two years at the High School of Commerce in Springfield, Missouri, I opened up a health food store. From the day I opened up that health food store I sold kelp. I still run that health food store. As part and parcel of that health food store I have kelp and I have it under the name of Kelp-I-Dine and I send it out as part and parcel of my store answering a letter asking for a product and we send it out

Q. Now, under what name do you operate that store?

A. I operate it now under the American Health Aids Company, formerly it was the Energy Food Center.

Q. Is that at Newark, New Jersey?

A. Of Newark, New Jersey.

Q. Mr. Pinkus, how far did you go in the Kirksville College of Osteopathy?

Mr. FAST. I object to it. I don't see what purpose that—where we couldn't qualify him. The questions were asked only for the purpose of qualification—qualifying him to admit these books. If counsel will give me some other reason I will withdraw my objection.

235 Mr. MANHERZ. Mr. Solicitor, I might state that was a matter that was covered on direct examination and certainly I think we ought to have a right to cross examine on the same subject.

Assistant SOLICITOR. And I don't wish to deny you that right but at the same time, Mr. Manherz, for the purpose of saving time, those questions were asked for the purpose, as I thought at the time, of qualifying the witness to give expert testimony on the effects of kelp. Now, that was the position by the attorney for the respondent, if it ever was his position, I—

Mr. FAST. (Interposing) I think that was clearly my only purpose.

Assistant SOLICITOR. —was abandoned and not pursued further and he stated into the record that he did not wish to qualify the respondent witness as a medical expert. Now, if you wish to cross examine him concerning his general educational qualifications I think it would be competent, but I don't see how it is too relevant now to the issues. But I am not ruling that you can't ask that question, Mr. Manherz.

Mr. MANHERZ. Well then, Mr. Solicitor, in view of counsel's change of position—

Mr. FAST. (Interposing) I said so in the record before.

Mr. MANHERZ. —that he did not desire to qualify him I here now—

Mr. FAST. (Interposing) As a medical expert.

Mr. MANHERZ. —move that all of the questions and answers relative to Mr. Pinkus' education be stricken from the record.

236 Mr. FAST. Oh, I am going to object to that because in case I take some other action I want it to appear that I attempted to qualify him.—

Assistant SOLICITOR. There is so much else in with it, Mr. Manherz, if I were inclined to sustain your motion, there is so much else in there that we couldn't definitely show just what was stricken and what was not, and if it be relevant to the issues it is harmless in the record. So, let's don't strike it.

By Mr. MANHERZ.

Q. Mr. Pinkus, in connection with your correspondence with the Food and Drug Administration did they ever approve the sale of Kelp-I-Dine as a treatment for the reduction of obesity?

A. I don't know.

Q. Well, in so far as you know did they? Did they ever inform you that it was a reducing—

A. No, they never did. The only letter I have ever received from the Food and Drug Administration besides that one was to come to see Mr. Cregen. After I saw Mr. Cregen there I never received any letter from the Food and Drug Administration besides the one that you have there. In other words, that is the only one I have ever received.

Q. You never received any communication from the Food and Drug Administration informing you that Kelp-I-Dine was a reducing agent?

A. No. I never received anything like that.

237 Q. Now, Mr. Pinkus, I believe you testified that you were using a certain circular in the sale of Kelp-I-Dine to which the Food and Drug Administration did object, and that Mr. Cregen of the New York Food and Drug Administration requested you to appear. Is that true, you were using a circular to which he objected?

A. At one time I was using the pink circular and I used it when I sent out my kelp instead of an instruction sheet. He told me not to use it. Since he told me not to use it I had stopped using it and never used it again since. That's why in other letters that your inspectors sent to me and what they received back was all Dr. Eddy's circular or Dr. Phillips' and not that one. In other words, I destroyed them all to my knowledge.

Assistant SOLICITOR. Is that identified anywhere in the record?

Mr. MANHERZ. Yes, sir, 3-C.

Assistant SOLICITOR. Government Exhibit 3-C.

The WITNESS. 3-C, that's right.

ASSISTANT SOLICITOR. Is that the one to which you refer?
 The WITNESS. That is the one I stopped.

By Mr. MANHERZ.

Q. How soon after you were called upon by Mr. Cregen about that circular did you discontinue its use?

A. Just as soon as I possibly could. You see you have to recognize one situation. We make up a lot of those cans in boxes in advance. You understand? We make
 238 them up in advance so if one day we get more orders than we can physically make up all that we have to do is to type the other stickers and send them out. So, from the very day, the very minute, that Mr. Cregen told me not to use that circular I went back and I said, "Boys stop work. Take all these red circulars, dump them in the ash can and out they go". However, some of these cans were already made up and Mr. Cregen said—implied at least—that if we had a lot they might—he didn't say that they would—give me some time to use them up. So, from the very day that I got back from that hearing, from that very afternoon, I stopped immediately from putting those red circulars in my cans that were made up. That's why, although one of them may have been mailed after that because they were made up in advance, I didn't want to destroy a lot of paper and create a lot of work to take them out, I didn't make up another one since. I didn't know what was going out and sometimes they are delayed as much as a month. I have seen them delayed as much as two months from the time we mailed them until the time they reached the customer. I have seen it take as much as a month for it to get to Washington, D. C. from Newark. But, right at that very day I had the boys stop and had printed up the yellow circular that Mr. Cregen and the Food and Drug Administration took no objection to, and then I went to Dr. Phillips. I was told by Mr. Cregen that if a doctor recommended something for reducing or if I were a doctor, or if a doctor said so, they would have no objection. So, I went to Dr. Phillips, who had been sending patients to me for Kelp-I-Dine and I said, "Now, what do
 239 you think of it?" and he wrote this for me. He wrote his reducing plan for me; he wrote a letter to me saying that it would cause a loss of weight of 3 to 5 pounds in the average individual. Based on his letters we made our subsequent ads and I included his diet as the instruction sheet which I was assured if a doctor said so the Food and Drug Administration wouldn't take any ob-

jection. I asked them that point specifically and that's exactly what they said.

Q. Let me ask you this, Mr. Pinkus: Isn't it true that the circular which Mr. Cregen took exception to mentioned the use of Kelp-I-Dine as a reducing agent and you subsequently removed that from your circular matter?

A. Yes, sir.

Q. Were you impressed any with the fact that exception was taken to the statements concerning Kelp-I-Dine as a reducing agent?

A. Yes. I was not impressed to say that it wasn't a reducing agent. He said he was not questioning whether this will reduce you or not reduce you. He was questioning the label. Before those two cans, which you now have, which they told me to make a little change on by that letter the cans are on, before that I had a label which was in red to match that red circular. It had a girl on a scale and it had the analysis that the Department of Commerce had sent me for these foods and which I had analyzed to find the same thing. It had that analysis on it, and he told me that unless a doctor were making a statement—unless a
240 doctor were saying it is good for Kelp-I-Dine I shouldn't say it and I should take the analysis off. I took the analysis off and presented that darker green label. Then, when I presented that I got the letter to make up the lighter green label.

Q. Well, isn't it true that at the present time, Mr. Pinkus, there is no reference on the label whatsoever to Kelp-I-Dine as a reducing agent?

A. That is true, and remember I made no statement even in my advertising subsequent to that as to Kelp-I-Dine as a reducing agent until I had at least one or two competent registered physicians who had gone on record saying that Kelp-I-Dine will cause a loss of weight of 3 to 5 pounds a week and that Kelp-I-Dine with its Kelp-I-Dine plan will give you the essential—

Q. (Interposing) Mr. Pinkus, I wish you would just answer my questions and not go into these discussions. I didn't ask you what any physicians told you and I take exception to your statement as to what these physicians did tell you, and I ask that the statement the physicians told him that Kelp-I-Dine would reduce from 3 to 5 pounds a week be stricken, Mr. Solicitor.

Mr. FAST. Well, I am going to object to that, because that was the question that was asked and he is giving the answer.

Assistant SOLICITOR. I think it was responsive though to the question asked.

Mr. FAST. May I suggest why it was. The counsel asked this question: weren't you put on guard, or words to that effect, when you appeared before the Food and Drug

241 Administration and they told you to change the label. And then he told that Mr. Cregen, or whoever was the individual with whom he spoke, had told him that if a doctor would say—that if a doctor or if Pinkus were a doctor—he would have the right to say that it is a reducer.

Mr. MANHERZ. Mr. Solicitor, my last question was, does he now make any reference on the label of Kelp-I-Dine that it is being offered as a reducing agent, and—

Mr. FAST. (Interposing) Well, that speaks for itself—

Mr. MANHERZ.—and he said no. Then he went on and offered this other which was not responsive to my question at all.

Mr. FAST. I don't object to your making a motion that it be deleted although I think it was brought out by the previous question.

By Mr. MANHERZ.

Q. Mr. Pinkus, what is your connection with the Energy Food Company?

A. I am the sole proprietor. No one else owns it but me.

Assistant SOLICITOR. Well, is that same thing true of the American Health Aids Company?

The WITNESS. Yes, it was formerly the American Health Aids Company and I changed its name. It was formerly Energy Food Center and I changed its name to American Health Aids Company.

By Mr. MANHERZ.

242 Q. Are you the sole proprietor of the American Health Aids Company and the Energy Food Center?

A. Yes.

Q. Do you have any connection at all with the American Institute of Food Products?

A. None at all.

Q. Do you know who Robert A. Bories is?

A. Robert A. Bories is the business manager of the American Food Products. He is the business manager and I think Dr. Eddy is the president. That's the only thing I know. Dr. Bories is the business manager of that program.

Assistant SOLICITOR. I think you will find an exhibit in the record there, Mr. Manherz, upon the letterhead of that institute which shows Mr. Bories' title.

By Mr. MANHERZ.

Q. Mr. Pinkus, you referred to the fact that before various advertising agencies would take food advertisements for broadcasting they had to be submitted to the American Institute of Food Products, I believe you stated?

Mr. FAST. No, he didn't say that.

The WITNESS. I will clear you up on that. What I did state was this: Before I could have my product advertised by Dr. Eddy over radio station WOR I had to present my product and what I was going to say about it and whatever supporting evidence I had to Mr. Bories and the American Institute of Foods. They had to first look that over. Then,

243 before I got on WOR, even after they would approve, their approval wasn't the final word as to whether

I got on WOR or not, then or subsequent or at the same time before I could even go on WOR—WOR has its own so-called vigilance committee—they call in, as far as I know, competent physicians before they accept a food product and make any claims for it. They took the folder that Dr. Eddy had written for me, which was sent through the mails, and his letter and thoroughly went over it—we took out all the objections they had—we made it so they had to approve it before it went on the air. And both WOR and the American Institute of Foods with Mr. Bories and Dr. Phillips approved that circular.

By Mr. MANHERZ.

Q. Isn't it true Mr. Pinkus that the American Institute of Food Products is also engaged in the sale of Kelp-I-Dine through the mail?

A. No, they are not engaged in the sale of Kelp-I-Dine through the mails.

Q. Are they engaged in the sale of Kelp-I-Dine in any manner?

A. I don't understand what you mean by the engagement in the sale of Kelp-I-Dine. I would like to explain to you and make clear how their circular and their letter came to be used.

Mr. FAST. Is that what you are after?

Mr. MANHERZ. Yes, I want to get their connection with this business.

244 The WITNESS. Well, I will tell you exactly how it came about. We found that WOR would not accept dollar bills to be sent to WOR and the dollar bills turned over to me and for me to sell the Kelp-I-Dine. They didn't want it that way. They said what they would do,

however, they would ask those who are interested in reducing to send for Dr. Eddy's free booklet on reducing. That is the booklet that you are looking at now. So they would send letters to WOR—a typical letter would say, "Send me your free booklet on reducing. Dear Dr. Eddy please do so."—and then Dr. Eddy would turn over to me those names and addresses of people who had inquired for that booklet and that letter. And we would send it out usually under Dr. Eddy's—usually but not always—usually under Dr. Eddy's envelope, Dr. Eddy's letter with the booklet and a business reply envelope bearing my name and address American Health Aids in return. And we would send them out free to whoever wrote for them. And then if the people wanted to, after reading the booklet and the letter, they could send in for it. If they didn't want it, well, they didn't order. A great many of them didn't order.

By Mr. MANHERZ.

Q. Mr. Pinkus, for the record I would like to ask you whether or not you are a graduate M. D.?

A. No, I am not. I am not an M. D. and never professed to be. I never professed even to be an expert.

Q. Do you have any degree in pharmacy?

A. No, I do not.

245 Mr. FAST. I object to that. I don't see where that makes any difference.

Mr. MANHERZ. Mr. Solicitor, I think it is a matter for the consideration of the Solicitor in order that he may know—

Assistant SOLICITOR. (Interposing) I think that's a competent question if he has a degree in pharmacy.

The WITNESS. I have answered it. No, I don't have a degree in pharmacy. I never made any statement about my advertising based upon my degrees—

Mr. FAST. (Interposing) Just answer the questions.

Mr. MANHERZ. Mr. Pinkus, have you any degree in pharmacology? Did you ever study pharmacology?

Mr. FAST. Don't shake your head.

The WITNESS. No.

Assistant SOLICITOR. The answer was "no", I take it.

The WITNESS. The answer is "no". In a form of class in pharmacology, no; but by myself—

Mr. MANHERZ. (Interposing) I asked if you had any degree in pharmacology.

The WITNESS. No, I have no degree in pharmacology.

Mr. MANHERZ. Mr. Pinkus, I show you a letter in evidence as Government Exhibit 5-C, being a letter on the letterhead

of the American Institute of Food Products bearing the names of Walter H. Eddy, Ph. D., President, and Robert A. Bories, General Manager. You are familiar with that letter?

The WITNESS. Oh yes, surely.

246 Mr. MANHERZ. Who prepared that letter, Mr. Pinkus?

The WITNESS. That letter was prepared jointly—not by me—jointly by Dr. Eddy and WOR.

Mr. MANHERZ. WOR?

The WITNESS. That's right. Radio Station WOR.

Mr. MANHERZ. Well, who at WOR?

The WITNESS. I don't know who. I didn't take care of the business transaction. My advertising agency with whom I am no longer associated went over to WOR and made the arrangements. I had nothing to do with it. I had no voice in its contents or in its make-up.

Mr. MANHERZ. That's all the questions.

(Witness excused.)

Mr. FAST. That's our case except for this reservation and I would like to put this on the record. I want to make a statement for the record. I want to say Mr. Pinkus does not want to violate any law and ~~that while we appreciate~~ that we cannot expect the postal authorities to write our ads I want to make it clear that I am perfectly willing to abide by any suggestion as to changes and we will now say that we are perfectly willing to make changes so that these various points suggested in the memorandum could not again be made against Pinkus. We don't want to make any statements that aren't strictly true.

I contacted Dr. Craster. Dr. Craster can't come out here.

I spent at least three hours yesterday telephoning
247 doctors in Washington. We called the Medical Society and the gentleman, who apparently was no doctor but is in charge of the Medical Society, gave us the names of other doctors and none were willing to testify because they say that the shortage of doctors in Washington is so acute that they couldn't find the time and they don't think it is fair to take that time off even though I assured them we would give them any fee that they would want. I told them we would give them our product, we would give them whatever medical research we have, and we would help them expedite their investigations.

Now, I think in view of the testimony of the last witness for the Government, and I say I was really very much surprised at his testimony because in my humble judgment it

is contrary to modern medical science, I would like to have the opportunity to present a doctor. I can't get one from here. I called up the Georgetown University and they gave me the name of a doctor yesterday and Mr. Pinkus left the hearing room yesterday at about quarter of three to meet with this doctor and his story is the same that he can't possibly find the time and he doesn't think it is fair to take the time from the sick that need—well, he says needs his attention more than coming here to testify. It appears now that I will need medical testimony. I knew all along I would need medical testimony. But, I would have been satisfied to have gone along with the testimony of the Government's witnesses if I hadn't found them to be contrary

248 to what I see with my own naked eyes in medical books that are issued by the A. M. A. for example. Now, I am not talking about dictionaries, I am talking about textbooks. I have in my hand, for example, "Handbook on Nutrition" published by the American Medical Association of Chicago which, in my humble judgment, is contrary to the testimony of the last doctor who appeared for the Government. Now, in view of that situation I feel constrained to ask for a continuance only for the purpose of putting in additional medical testimony.

Mr. MANHERZ. Mr. Solicitor, may I make a statement?

Assistant SOLICITOR. Yes, I want you to make a statement.

Mr. MANHERZ. Mr. Solicitor, in connection with his preparation for this case counsel must have been aware that his client was not qualified to give competent testimony as to the therapeutic effects of his treatment. He must have been aware that to adequately defend his client it will be necessary for him to secure expert witnesses and it must have been apparent to him that the Government was going to present expert witnesses here in its case. He was told, as I understand it, in a conversation with Mr. O'Brien of this office that he could have until Saturday of this week to produce some medical man—

Mr. FAST. (Interposing) Originally I was going to have Dr. Craster, not as an expert, but he was one of the doctors who had made an endorsement of this product, and he couldn't come here because of his public connections with the Health Board until Saturday and I now find out
249 from him that he can't come here at all on account of the shortage of doctors.

Mr. MANHERZ. Mr. Solicitor, in view of the tremendous

amount of mail that's being received in this mail-order enterprise, something like 700 pieces of mail a day—

Mr. FAST. (Interposing) You have got two figures. One of your figures is three hundred and something and the other is seven hundred.

Mr. MANHERZ. —some large amount of mail I am not—

Mr. FAST. (Interposing) No, you've got two figures in the testimony.

Mr. MANHERZ. Well, both of which are large—

Mr. FAST. (Interposing) One is three hundred I think.

Mr. MANHERZ. Three hundred pieces of mail a day is considerable business and if this enterprise is objectionable under the statutes I don't think that any extensive time should be granted counsel to produce any medical experts as he requests, because, as stated before, he must have been aware of the need for such medical testimony in his preparation for the case, and any extended continuance would permit the further operation of what I conceive to be a fraudulent enterprise through the mails and I certainly am opposed to any extended time.

Mr. FAST. May I say this in answer to what counsel has just said for the record. I intended to use a doctor but I also thought there was something more or less static about medical knowledge. I have used textbooks in my
250 preparation which were prepared by recognized physicians and medical organizations. I thought that maybe there was something to the medical profession that would keep these men together on precepts of medicine as outlined by these authorities. I was going to be perfectly willing to abide by the testimony of the Government because I didn't think they were going to go so strong against the acknowledged authorities of medical books. We are not as bad as counsel paints us. We have thousands of letters from people—I don't think we are doing any harm at all—but I don't want an adjournment to a day far in advance, any day next week, and that's the only testimony I'll bring and I know I can get a doctor to come down.

Mr. MANHERZ. Mr. Solicitor, in the first place I think the calendar of fraud order hearings is rather full for next week and I don't think there is really any open date that this case might be postponed during next week. And in connection with Mr. Fast's statement that they have thousands of letters from people saying that the treatment has done them good and none from anyone stating any harm, of course it is a well known fact that dead men tell no tales

Mr. FAST. Now, don't you dare say that anybody dies as a result of our product or you will have to answer.

Assistant SOLICITOR. I am not taking that seriously.

Mr. FAST. No, but I think it ought to go into the record.

251 Assistant SOLICITOR. Well, I will treat it and let the record so show that it is a gross exaggeration on the part of Government counsel and I think he said it facetiously.

Mr. FAST. No, I don't think so.

Assistant SOLICITOR. Well, I am going to take it that way and we will let the record so show that I did.

Mr. MANHERZ. In any event, Mr. Solicitor, there is a considerable amount of business being done through the mails in this enterprise and if it is a fraud as the Government conceives it to be no further time should be granted beyond this week.

Assistant SOLICITOR. The big difficulty, Mr. Fast, is trying any of these things piecemeal. It is a very trying experience. We have only tried one case since I have been heré which was long and dragged out and it puts the Government at a considerable disadvantage particularly when there is a medical question involved and counsel should know in advance that we are going—when I say “we” I mean the Government or Department—to introduce medical testimony; and if there is going to be any contradictory testimony it seems to me that you've had—I don't know the date. What is the date of the memorandum of charges, Mr. Rennie?

Mr. RENNIE. November 23, 1944.

Assistant SOLICITOR. Well, that's six or seven weeks. The Congress passed this act for the protection of the public and one who is making claims for a product it seems
252 to me ought to be able to substantiate those claims by competent medical proof. I think it should be anticipated that he would have to when these charges were served upon him.

Now, you and Mr. O'Brien agreed that the case would be passed until Saturday morning. That was even though we didn't go into today. I'll still hold that agreement is validly made.

Mr. FAST. Maybe I can get someone down here Saturday morning.

Assistant SOLICITOR. Well, we have already agreed, Government counsel has agreed that you might have somebody

here Saturday morning but beyond that I don't feel inclined to grant any continuance.

Mr. FAST. If I don't bring anybody down Saturday I will send you a wire or call you up so that you won't have to come down here.

Mr. MANHERZ. Mr. Solicitor, I have been informed that in a previous conference in this matter counsel was advised by Mr. O'Brien of this office that he would need medical testimony.

Assistant SOLICITOR. Well, I think Mr. Fast stated in the record that he anticipated it. Did you not make that statement that you anticipated that you should have medical testimony?

Mr. FAST. Yes, I said that and I also said I anticipated that the doctors for the Government would testify along the lines that the modern scientific medical books speak and that I probably would have abided by their statements.

253 Mr. MANHERZ. And so they have, Mr. Solicitor.

Assistant SOLICITOR. Well, Mr. Fast has already said that he would endeavor to have a doctor here Saturday morning. Now, at what hour Mr. Fast would you want to reconvene on Saturday morning if you can get a doctor down here?

Mr. FAST. Well, I suppose we could make a midnight train on Friday. Say about 10:30.

Assistant SOLICITOR. That's satisfactory 10:30 Saturday morning. I think that was agreed on—

Mr. FAST. (Interposing) If for any reason I can't get a doctor I will call you or telegraph you tomorrow.

Assistant SOLICITOR. Well, a telegram would be sufficient and I will appreciate your doing that so that we will know whether or not you will be here and not be waiting on you.

Mr. O'BRIEN. I would like to say on the record, Mr. Solicitor, that you will recall that yesterday or the day before you and I and Mr. Fast had a bit of conference before the bench—

Assistant SOLICITOR. (Interposing) That was yesterday.

Mr. O'BRIEN. Yes. --and that Mr. Fast then agreed that he would bring his witness here on or before Saturday whether he got him locally or from outside the District.

Assistant SOLICITOR. Well, I recalled that agreement to Mr. Fast a few minutes ago that Government counsel and he had agreed to an adjournment until Saturday morning for that purpose.

Mr. FAST. Yes, but we also said though that we would try to finish it today.

254 Assistant SOLICITOR. Yes, you said if you could get a local doctor you would try to finish today.

Mr. FAST. I tried to get a local doctor and I nevertheless tried to finish it today but of course we are only arguing about words.

Mr. MANHERZ. Mr. Solicitor, what is the situation if Mr. Fast is unable to appear here Saturday morning?

Mr. FAST. I guess that's the case.

Assistant SOLICITOR. Well, for the purpose of the record you want that clarified I assume.

Mr. FAST. Yes, sir.

Assistant SOLICITOR. Then we will agree that if you don't make your appearance that the case will be closed as far as the evidence is concerned.

Mr. FAST. I supposed there is nothing else for me to do.

Assistant SOLICITOR. All right, gentlemen, let the record show that the case is adjourned until 10:30 a. m. Saturday, January 13th.

(Whereupon, the hearing adjourned at 4:25 o'clock p. m. on January 11, 1945, until 10:30 o'clock a. m. on January 13, 1945.)

254a

Transcript of Proceedings

Before the Solicitor for the Post Office Department

Holding a Fraud Order Hearing

F. & L. Docket 14/303

In the Matter of

AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER;
both at Newark, New Jersey;

AMERICAN INSTITUTE OF FOOD PRODUCTS; WALTER H. EDDY;
WALTER H. EDDY, PH. D.; WALTER H. EDDY, PH. D., President;
DR. WALTER H. EDDY, PH. D.; and ROBERT A. BORIES,
General Manager, all at New York, New York.

January 13, 1945, and
February 1, 1945,
Washington, D. C.

255 Before the Solicitor for the Post Office
Department

Holding a Fraud Order Hearing

F. & L. Docket 14/303

In the Matter of Charges That

AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER;
both at Newark, New Jersey;

AMERICAN INSTITUTE OF FOOD PRODUCTS; WALTER H. EDDY;
WALTER H. EDDY, PH. D.; WALTER H. EDDY, PH. D., Presi-
dent; DR. WALTER H. EDDY, PH. D.; and ROBERT A. BORIES,
General Manager, all at New York, New York,
are engaged in conducting a scheme for obtaining money
through the mails by means of false and fraudulent pre-
tenses, representations and promises, in violation of 39
U. S. Code 259 and 732 (Sections 3929 and 4041 of the
Revised Statutes, as amended).

Washington, D. C.

Saturday, January 13, 1945.

Hearing of the above-entitled matter was resumed before
Honorable Daniel J. Kelly, Assistant Solicitor of the Post
Office Department, in the hearing room of the Post Office
Department, on Saturday, January 13, 1945, at 9:35 o'clock
a. m.

256

APPEARANCES

On behalf of the Post Office Department: W. V. Rennie,
Esq., Ralph B. Manherz, Esq.

On behalf of the respondent: American Health Aids
Company, Energy Food Center, Joseph John Pinkus, Esq.

Proceedings

(Dr. Assadour Melkon Altounian was sworn as a witness
in behalf of the respondent by a Notary Public of the Dis-
trict of Columbia.)

Assistant SOLICITOR. Proceed, Mr. Pinkus.

Mr. PINKUS. In view of the fact that my attorney, Mr.
Louis Fast, went to the doctor yesterday (not this doctor
another doctor) and found that he had a very high blood
pressure of 260 points he was told to go to bed for at least
the next few days, and since the hearing was set for this
morning he suggested that I come down here and ask the
questions, which he wrote out, which he would ask himself.

In the absence of Mr. Fast I am, with the kind permission of your Department, asking the questions that he would ask of the Doctor.

Assistant SOLICITOR. That's all right, any respondent has the right to represent himself when counsel isn't present, so it is perfectly proper.

Whereupon,

257 DR. ASSADOUR MELKON ALTOUNIAN, called as a witness for and in behalf of the respondent and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. PINKUS.

Q. Now, Doctor, please give us your full name and address. I understand you wrote it down for the lady here.

A. Assadour Melkon Altounian.

Q. And where do you live, Doctor?

A. 42 West Market Street, Newark, New Jersey.

Q. What is your occupation or profession?

A. Physician.

Q. How long have you been practicing medicine?

A. Since twenty-four years in this country.

Q. Where have you been practicing in this profession?

A. Newark, all the time.

Q. From what schools have you graduated?

A. From American medical school, American Medical University, Beyrouth, Syria.

Q. Of what medical societies are you a member?

A. American Medical Association.

Q. Any other societies?

A. No.

Q. Are you connected with any hospital or clinic now, and if so what ones?

258 A. Yes, I am. I am one of the admitting physicians of the City Hospital of Newark and I am connected with St. Michael's Hospital, Newark, New Jersey.

Q. Are you a general practitioner?

A. Yes, I am.

Q. Are you acquainted with the various methods used in the treatment of obesity?

A. Yes, I am.

Q. What effect, if any, does iodine or iodine preparations like kelp or fucus have on the treatment of obesity?

A. They are anti-fats for reducing.

Q. Would you say that Kelp-I-Dine could be used in the treatment of obesity?

A. Yes, it could be.

Q. Given a dosage of a half teaspoonful of Kelp-I-Dine or kelp, which is equal to approximately three tenths of a milligram, and Dr. Phillips' diet, which the Court has designated 3-H and which I now show you, would a person be apt to reduce in weight if he took the Kelp-I-Dine and the diet?

A. Yes, he will.

Q. How much would he lose in weight?

A. From three to five pounds in a week.

Q. What effect physically would taking Dr. Phillips' plan have on the user? In other words, if he followed that—

A. Reducing effect.

Q. Does the plan give the user sufficient calories
269 for his needs?

A. Yes, it does.

Q. How many calories are there in the plan known as Dr. Phillips' Reducing Plan?

A. One thousand calories.

Q. Assuming that a person uses this plan until he reaches normal weight, would he be harmed in any way?

A. No, he would not be.

Q. In other words, it is harmless?

A. Harmless.

Q. In the course of your studying the subject what books have you had the occasion to examine?

A. All medical books that we use in general practice and at the same time American Medical Association Journal—the Journal of the American Medical Association—and the book written about nutrition.

Q. In other words, you have read the American Medical Association's Handbook of Nutrition?

A. Yes.

Q. And you are familiar, are you, with the best and reliable medical dictionaries?

A. Yes, I am.

Q. Did you check these photostatic copies that I have—did you look at these photostatic copies and see if they were the same as in the dictionaries?

A. Yes, I did and they are just the same.

260 Q. How are these works, that is, the "American Illustrated Medical Dictionary" by Dorland, "Steadman's Medical Dictionary," the "Handbook of Nutrition" and "Merk's Index," how are they regarded in your profession?

A. They are reliable. They are standard books.

Q. Did you agree with the contention that these photostats say—that these books say—do you agree that what they say about fucus is so?

A. Yes.

Q. In other words, you agree that whatever is said in these books about fucus is the truth?

A. Yes.

Mr. PINKUS. I offer the photostatic copies of these two books that the Doctor looked at— Did you look at both of them?

The WITNESS. Yes, I did, both of them.

Mr. PINKUS. —in evidence.

Mr. MANHERZ. Of course, Mr. Solicitor, I still object to such evidence. The Doctor is here to testify as an expert I assume on this subject and if he relies on these books he can give his testimony but this still doesn't qualify these books as admissible evidence. The Doctor is the witness here and if he is relying on these statements he can so state but that doesn't make the books or the photostatic copies of pages from those books admissible as evidence.

Mr. PINKUS. I ask that these books be admitted.
261 If there is any refusal I ask that my exception be noted. I say that the Doctor looked at the books and looked at the photostats. I am willing to have you look at the books and at the photostats and I am willing to prove to you or let you decide for yourself whether or not they are exactly the same. The Doctor says they are exactly the same, and I again wish to offer these in evidence.

Assistant SOLICITOR. The Doctor, it seems to me, has the right to take a medical book and say "I adopt that statement in that medical book as my testimony and I believe (I am quoting the Doctor now) and I believe that the statement is an accurate statement and it is my opinion that it is a true statement." I believe that he can state that because he would have the right if he sees fit to cite as his authority—being an expert witness—he would have the right to cite as his authority for his opinion certain medical books. He would have that right. And if his opinion were to vary from those books you would have the right to cross examine him upon those books.—Now, he is not introducing the books in the strictest sense into evidence. He is stating as an expert "I approve of what is said in those books" and it is my opinion that it is an accurate statement of scientific thought or it is an accurate scientific statement. So he could read them into the record and he is putting those books up

to substantiate or to confirm his own testimony. That's my opinion, Mr. Manherz, I will be glad to hear you.

Mr. MANHERZ. Mr. Solicitor, I don't like to disagree with your Honor but I think the rule—

262 Assistant SOLICITOR. (Interposing) You have a perfect right to disagree with me.

Mr. MANHERZ. —but I think the rules of evidence on expert witnesses are, as I understand it, that if the witness appears in person he certainly has the right to state any scientific or other books upon which he relies for his testimony, but that does not in and of itself make the books that he mentions admissible as evidence. He has the right to—

Assistant SOLICITOR. (Interposing) I will hear you on any subject or if you have any authorities.

Mr. PINKUS. I would like to present these two photostatic copies of these books in evidence.

Assistant SOLICITOR. We are going into that now, Mr. Pinkus. I am listening to the law that Mr. Manherz is going to read me and if the law is otherwise than what I have stated it I will stand corrected.

Mr. MANHERZ. With your kind permission I would like to read from section 579 of Jones On Evidence, Civil Cases, Third Edition, published in 1924 (Reading):

Use Of Scientific Books In Examination Of Experts.

It is generally conceded that where experts are examined as to question of science they may give their opinions and the ground and reason therefor although they state that such opinions are in some degree founded upon treatises on the subject. But, it has been held inadmissible for such a witness to read to the jury from books although he concurs in the views expressed, or to even state the contents of such books though he may refer to them to refresh his memory.

263 And I call your particular attention to the next statement:

Mr. PINKUS. May I make a statement, please.

Assistant SOLICITOR. Just a minute, Mr. Pinkus.

Mr. MANHERZ. (Reading continued);

But when an expert has given an opinion and cited a treatise as his authority the book may be offered in evidence by the adverse party as impeaching testimony, *but* unless the book is referred to in cross examination it cannot be used for this purpose. It would be a mere evasion of the general rule under discussion if counsel were allowed on cross examination to read

to the witness portions of such works and asked if he concurred in or differed from the opinions there expressed, and hence this is not allowed.

So, in my opinion Mr. Solicitor the statement that unless the adverse party, as stated in this text, desires to impeach his testimony by the introduction of such books upon which he relies to give his testimony they are not admissible in evidence.

Assistant SOLICITOR. What do you say to that, Mr. Pinkus? Do you have any other authority, Mr. — I will listen to the reading of it. I don't care to see it.

Mr. PINKUS. I merely say that the Doctor adopts these statements about fucus in these two dictionaries as his own statements and he wants to present them in evidence.

Assistant SOLICITOR. Mr. Manherz has read me some very strong authorities to the contrary which makes my former reasoning fallacious; it appears to me.

Mr. PINKUS. All right. All that I ask is that my exception be noted.

264 Assistant SOLICITOR. All right, let your exception be noted. I sustain Government counsel's objection because I was in error.

Mr. PINKUS. That's all right. I just want that my exception be noted.

Assistant SOLICITOR. I never hesitate to admit it.

Mr. PINKUS. Do you know if doctors use iodine preparations with the same content as Kelp-I-Dine in the use of obesity? In other words, do doctors recommend .3, that is, three tenths of a milligram of iodine found in Kelp-I-Dine, in the treatment of obesity?

The WITNESS. Yes.

Mr. MANHERZ. Did he answer that question, Mr. Solicitor?

Assistant SOLICITOR. Yes.

Mr. MANHERZ. Well, I object to the question and the answer and move that it be stricken for the reason that unless this Doctor states that he knows what doctors do generally he is not qualified to answer the question. He can state what he uses if the question is asked him but not what doctors generally use. And I move that the question and answer be stricken.

Assistant SOLICITOR. Isn't there an issue though before us here, Mr. Manherz. In other words, it is charged in the memorandum of charges that the respondent represents that all doctors use Kelp-I-Dine with the diet, or the Kelp-I-

Dine treatment, one or the other, but that is averred that they represent that all doctors do. Now, that is an issue of fact as to whether that representation, if it is made, is false. I don't think the advertising shows that they use the words "all doctors use" but they do use language which might be interpreted to mean that doctors generally use. Now, of course, this doctor is no more qualified than the Government's expert witnesses were qualified to say whether *all* doctors do use that because that isn't within their knowledge. It isn't within this doctor's knowledge. But, our doctors testified, you will recall, both of them, that they knew of no doctors who used this. They testified that. Now, this doctor can at least testify—I am going into this in detail because Mr. Pinkus isn't a lawyer and I want to explain to him what limits he may examine him. Now, I think this doctor can testify that he knows of doctors who *do* use it but your question, Mr. Pinkus, is too broad when you say "do doctors use it." Now, say—ask him if doctors with whom he is associated and doctors whose practice is within his knowledge use Kelp-I-Dine.

By Mr. PINKUS.

Q. Do doctors that you know of within your practice use kelp in the treatment of obesity and iodine in the treatment of obesity?

A. I know many doctors that use iodine for obesity but I don't know any doctor that uses Kelp-I-Dine for obesity.

Q. But you do know doctors who give .3 milligrams of iodine in the treatment of obesity?

A. Yes, they do. May I add—

263 Assistant SOLICITOR. Yes, you may add.

The WITNESS. We had a pharmacopoeia, the United States Pharmacopoeia, which is recognized by the American Medical Association, and iodine is one of the drugs recognized by that Pharmacopoeia, American Medical Association. Every doctor recognizes that—the effect of iodine but not about Kelp-I-Dine.

Mr. PINKUS. Not Kelp-I-Dine but just iodine, which we know and the Government's chemist has said does contain iodine.

By Mr. PINKUS.

Q. What is the effect of iodine on the system?

A. It effects in several ways. It reduces the weight; it is anti-fat; it increases the metabolism.

Q. In other words, iodine increases the metabolism?

A. Yes, it does.

Q. Iodine helps to reduce weight?

A. It does.

Q. Have you ever heard of Merck's Index or Merck's Manual?

A. Yes, I have.

Q. Do you agree with the statement in Merck's Manual that iodine is used in the cure of obesity?

Mr. MANHERZ. Mr. Solicitor I object to that statement. He can ask him his personal opinion as an expert concerning the effects of iodine and if he wants to, as I understand the laws of evidence, he can ask him if he relies upon any authorities or textbooks as a basis for his testimony
267 he can answer that question, but he can't, as I understand it, read and in effect put into evidence the book itself under the rules. The Doctor is here as an expert. He is here to give expert testimony on the subject before the Solicitor and, as I understand the rules of evidence, it is supposed to be his own personal opinions and testimony on the subject.

Assistant SOLICITOR. We settled that, Mr. Manherz. I sustained your former objection which was identical, and the questions were identical and the same question presented to me, Mr. Pinkus. Now, you have the right, as your lawyer has instructed you, to offer those in evidence and you have the right to ask that question but I have to sustain the Government counsel's objection to them on the grounds I have stated.

By Mr. PINKUS.

Q. You generally recognize Merck as a reliable source of information?

A. Yes, it is reliable.

Q. You have relied upon that yourself many times?

A. Yes.

Q. Do you agree with their statement about focus?

Mr. MANHERZ. Mr. Solicitor, that's still the same objectionable question.

Assistant SOLICITOR. I sustain the objection.

Mr. PINKUS. I offer Merck's Index, particularly what it says about focus, in evidence.

Assistant SOLICITOR. For the reasons I have already given I sustain the objection of Government counsel.
268

Mr. PINKUS. I ask that my exception be noted.

Assistant SOLICITOR. Your exceptions are all noted without comment from me, Mr. Pinkus.

By Mr. PINKUS.

Q. What is an anti-fat, Doctor?

A. Something that is against fat, reducing aid.

Q. An anti-fat is a reducing aid, is that right?

A. Yes.

Q. Do you agree that kelp or fucus is an anti-fat?

A. I do.

Q. It is not generally felt that obesity is bad for a person being overweight, Doctor?

A. Sure it is.

Q. Is it not better for a person to be near his natural weight than to be overweight?

A. Yes.

Q. In every case?

A. In every case.

Q. Would Kelp-I-Dine by itself cause some, no matter how little, weight reduction?

A. Yes.

Q. It would?

A. It would on account of its iodine content.

Q. Is it not—Is not food also necessary and advisable to take for the purpose of nourishment?

A. Sure it is.

Q. Could not a person continue to eat ice cream and other things like potatoes and still if he followed Dr. Phillips' plan and cut down on those things, couldn't he also lose weight?

A. Yes.

Q. In other words, he could eat ice cream, pie, cake, and bananas and still lose weight if he cut down on them.

A. If he cuts down, yes.

Q. But he could still eat those things and lose weight. Is it not true, Doctor, that all people whether stout or thin, unless they have complete control of themselves, have a craving for eating?

A. Yes.

Q. Even overweight people like to eat and underweight people like to eat.

Q. Yes.

Q. Would not a diet of this kind apt to curb such appetite?

A. Yes.

Mr. RENNIE. Objection, your Honor. I think Mr. Pinkus should identify the diet.

Mr. PINKUS. I am talking about this Dr. Phillips' diet.

Assistant SOLICITOR. I think that was understood, Mr. Rennie. That's what he has been talking about all the way through, but I think it should be emphasized that he is talking about the particular diet, Government Exhibit 3-H.

270 By Mr. PINKUS.

Q. In other words, you agree that Dr. Phillips' Reducing Plan will help curb the appetite?

A. Yes, it will.

Q. When you take iodine and it increases the metabolism, does it burn up fat?

A. Yes, it does.

Q. Is taking fucus to the extent mentioned in Dr. Phillips' Kelp-I-Dine Reducing Plan or Kelp-I-Dine itself, doesn't that give you more energy and pep because of the analysis of the kelp?

A. Yes, on account of its salts.

Q. On account of the salts that are in kelp?

A. Yes.

Q. You are familiar then with the analysis of fucus?

A. I have seen that.

Q. You agree then that it supplies some of the minerals or supply the minerals that—

Mr. MANHERZ. (Interposing) Mr. Solicitor, I don't know whether Mr. Pinkus is reading his questions from a page or not. I suspect that he is drafting them in his own language and they are—I have objected before but they are very very leading. While I realize that he is not an attorney I think he ought to ask them without leading the witness to the answers.

Mr. PINKUS. All right. I will ask them any way you wish.

Assistant SOLICITOR. Mr. Pinkus you are not a lawyer and I should explain to you that you cannot
271 violate the rule against leading the witness, your own witness, and that rule means that you must not put words into the mouth of your witness. Ask questions which do not indicate the reply. You may ask your questions in that way. You can repeat that by saying what is the effect of so and so. Don't say, isn't it correct that so and so does such and such. Just say, what is the effect of so and so.

By Mr. PINKUS.

Q. What is the effect of Kelp-I-Dine on hidden hunger?

A. Please, once more.

Q. What is the effect of the minerals in Kelp-I-Dine on hidden hunger?

A. It satisfies that hunger.

Q. It satisfies hidden hunger, is that your answer?

A. Yes.

Q. Have you ever seen these ads yesterday or any other time?

A. Yes, I have seen them.

Q. You have seen both of them?

A. Yes, both of them.

Mr. RENNIE. Just identify the ads, Mr. Pinkus.

Mr. PINKUS. I will identify the ads as the one-column ad, whatever number you have to it, and also the two-column ad. That's the big ad that appeared in that Love Magazine. I will take your ads if you wish.

272 Assistant SOLICITOR. Well, they are in Government Exhibit 2, if those are photostatic copies.

Mr. PINKUS. I will leave them with you and you can compare them. Do you agree that there is nothing medically wrong—

Assistant SOLICITOR. Mr. Pinkus, Mr. Manherz is about to object that you can't ask such a leading question as that. You can't ask a question that is that broad. You may take up certain phases of the ads and ask non-leading questions but don't put words in your witness' mouth.

Mr. PINKUS. As a physician do these ads, or do they not, conform to medical consensus?

Assistant SOLICITOR. I anticipate your objection, Mr. Manherz. You can't ask a question that broad, Mr. Pinkus, and ask the Doctor to put his stamp of approval on everything in your advertisement. He might even interpret certain of the language of the advertisement differently from what you do or from what I would.

Mr. PINKUS. I will rephrase that question. Do you find anything wrong in any of those ads?

Assistant SOLICITOR. That has the same effect, Mr. Pinkus.—

The WITNESS. (Interposing) Yes, it is.

Assistant SOLICITOR. —Wait just a minute, Doctor, I rule that you cannot answer that question in that form. You cannot ask the Doctor to put his stamp of approval on your advertising. You may ask him questions about your product and about your diet but you cannot ask the Doctor the broad question, are there any misrepresentations in the advertising. If you have asked him one question already on direct examination. You asked him

how much your product and diet would reduce a person, and he said from 3 to 5 pounds a week. That's in your advertisement. Now, you can ask him similar questions to bring out the accuracy of your advertising if you wish but don't ask him about the whole ad.

Mr. PINKUS. I will do that. Are you agreed, Doctor, that you can reduce safely with Kelp-I-Dine? Or rather, do you think you can reduce safely with Kelp-I-Dine?

The WITNESS. Yes, I do.

Mr. PINKUS. Do you agree that no exercise is necessary—

Assistant SOLICITOR. (Interposing) Mr. Pinkus you will have to talk closer to the microphone.

Mr. PINKUS. Do you feel that no exercise is necessary or they may take it with this diet to reduce?

The WITNESS. Exercise is necessary. We can't do without it.

Mr. PINKUS. Exercise is necessary?

The WITNESS. Yes.

Mr. PINKUS. But they don't have to take more exercise— If a normal person goes through his regular daily routine and follows this diet, will he lose weight?

The WITNESS. Yes, he will.

Mr. PINKUS. If a normal person will lose weight going through his normal routine do you mean then that he doesn't have to take any additional exercise like going to a gym?

274 Assistant SOLICITOR. That's rather leading, Mr. Pinkus.

Mr. PINKUS. All right, let me ask this. I won't say "do you agree." I will try to refrain from using those words.

By Mr. PINKUS.

Q. Do you feel that additional exercise beyond a person's normal routine is necessary to reduce? In other words, can you reduce by following this diet and taking Kelp-I-Dine without going to a gym for exercise?

A. Yes.

Q. Would you say that Kelp-I-Dine is harmless?

A. Yes, it is harmless.

Q. Would you feel that a person can eat as they usually do but cut down on their food and still reduce?

A. Yes.

Q. With the aid of Kelp-I-Dine?

A. Yes.

Q. You feel that the diet alone will cause a reduction in weight?

A. It will.

Q. You feel that Kelp-I-Dine will be an aid to reducing?

A. Yes.

Q. That Kelp-I-Dine alone will be of some help—Do you feel that Kelp-I-Dine alone will be some help to reducing?

A. Yes.

Q. Do you feel that this is an easier way to reduce than many other ways that could be thought of?

275 Mr. MANHERZ. Mr. Solicitor—

Mr. PINKUS. All right, I will rephrase that. Do you think that there is anything extremely hard—I mean extremely hard—in reducing this way?

The WITNESS. No.

Mr. PINKUS. Do you think it is a comparatively easy way to reduce?

The WITNESS. No—easy.

Mr. PINKUS. You mean you think it is an easy way to reduce?

The WITNESS. (Witness' reply not recorded.)

Assistant SOLICITOR. Doctor, talk a little louder please, so you will record easier.

By Mr. PINKUS.

Q. Do you feel that when a person reduces on this plan they will lose some inches of fat around their thighs if they are large before they started?

A. Yes, they will.

Q. Do you feel a person will lose naturally if they followed this diet and take Kelp-I-Dine?

A. Yes.

Mr. RENNIE. If your Honor please, it seems to me that Mr. Pinkus is still leading his witness.

276 Assistant SOLICITOR. A very leading question, Mr. Pinkus, and a very broad question. I will have to sustain the objection to the question and answer, and the answer will be stricken.

By Mr. PINKUS.

Q. Do you feel that a person can follow this diet and lose weight slowly if they wish?

A. Yes.

Q. Do you think they can do that without feeling very hungry?

A. Yes, they can.

Q. Do you feel that a person will get a more slender figure if they reduce?

A. Sure.

Q. You feel then if they took Kelp-I-Dine and the reducing plan they are apt to have a more slender figure?

A. Yes.

Q. Have you heard of anybody or read of anybody who has reduced with Kelp-I-Dine?

A. No, I have not.

Q. Have you seen any letters of testimony?

A. Yes, I have seen them.

Q. What do those letters say, approximately?

Mr. MANHERZ. Mr. Solicitor, I object to that.

Assistant SOLICITOR. The objection is sustained, Mr. Pinkus. The Doctor is here as an expert witness and he cannot tell what he has read in some inexpert statements.

Mr. PINKUS. Do you feel that if a person admits to losing weight by following this diet and taking Kelp-I-Dine that it would be a true statement?

277 Assistant SOLICITOR. Mr. Pinkus, the same objection will be made I anticipate and you cannot ask even your expert witness concerning the statements made in testimonials by lay witnesses,—

Mr. PINKUS. Well, I will withdraw all those questions.

Assistant SOLICITOR. —whether they be in writing or orally.

By Mr. PINKUS.

Q. Have you heard of the Dispensary of the United States of America?

A. Yes.

Q. Do you think it is a reliable source of information?

A. Yes.

Q. Would you agree with their statement about obesity and kelp in that book?

A. Yes.

Mr. PINKUS. I offer what the Dispensary of the United States of America says about kelp and obesity in evidence.

Mr. MANHERZ. Same objection as formerly, Mr. Solicitor.

Assistant SOLICITOR. And the objection is sustained for the reasoning heretofore given, Mr. Pinkus.

Mr. PINKUS. I ask that my exception be noted.

By Mr. PINKUS.

Q. Have you heard of Gould's Medical Dictionary?

A. Yes, I have.

278 Q. Do you agree with what is said about fucus and obesity in Gould's Medical Dictionary?

A. Yes, I do.

Mr. PINKUS. I offer Gould's Medical Dictionary in evidence.

Mr. MANHERZ. Same objection.

Assistant SOLICITOR. Same ruling.

Mr. PINKUS. And I ask that my exception be noted.

By Mr. PINKUS.

Q. Have you heard of the Pharmaco-Therapeutics Materia Medica and Drug Action?

A. Yes.

Q. Do you agree with what they say about fucus being an anti-fat remedy?

A. Yes.

Q. In your opinion is fucus an anti-fat remedy?

A. It is.

Mr. PINKUS. I offer what the Pharmaco-Therapeutics Materia Medica and Drug Action has to say about fucus and obesity and being an anti-fat in evidence.

Mr. MANHERZ. Same objection as to the other, Mr. Solicitor.

Assistant SOLICITOR. Same ruling.

Mr. PINKUS. I ask that my exception be noted. All right, your witness.

279

Cross Examination.

By Mr. MANHERZ.

Q. Doctor, would you please state again the place of this American Medical University. I didn't get that.

A. Beyrouth in Syria.

Q. Did you study any further medical subjects in the United States of America?

A. I took the examination of the state, I passed it and I was entitled then to practice medicine.

Q. What year was that, Doctor?

A. In 1924.

Q. Now, have you taken any further studies in the United States on medical subjects in addition to those—

A. (Interposing) No special course.

Mr. PINKUS. May I ask a question?

Assistant SOLICITOR. No, not at this time, Mr. Pinkus. Let the Government counsel cross examine. Don't interrupt him unless you have an objection.

Mr. PINKUS. I have an object to that. I object to the last statement. The opposing counsel wishes to say that the Doctor had no other English-speaking education besides what he had in Syria. I know that the Doctor has or I heard that the Doctor has taken English-speaking—

Assistant SOLICITOR. (Interposing) Well, he has already testified that he hasn't Mr. Pinkus, that he has not taken any special course.

280 Mr. PINKUS. I am talking about this country.

Assistant SOLICITOR. But he has said he took no special courses in this country though, and we will accept his testimony over yours Mr. Pinkus.

Mr. MANHERZ. Mr. Pinkus let me say this: I asked him any medical courses.

Mr. PINKUS. Well, he studied graduate medical courses after his study in London. Is that true, Doctor?

Assistant SOLICITOR. You must not testify for the Doctor. You wait Mr. Pinkus. Anything that you want to bring out, Mr. Pinkus, don't interrupt Government counsel make a note of it and on re-direct examination, after the Government counsel is through with his cross examination, then ask those questions. You can ask him if he studied in London later, but don't interrupt Government counsel.

Mr. PINKUS. All right.

Assistant SOLICITOR. Except to make an objection.

By Mr. MANHERZ.

Q. Doctor, when did you graduate from the American Medical University at Beyrouth, Syria?

A. 1906.

Q. 1906?

A. Yes.

Q. Did you practice in Syria?

A. No, in Turkey.

Q. In Turkey?

281 A. Yes.

Q. How many years did you attend the American Medical University?

A. Four years, the general course. And three years in the hospital, internship.

Q. Have you had any previous college education?

A. Yes, I had.

Q. What was that?

A. College graduate.

Q. From what school?

A. American College in Damascus (?), a missionary school it is.

Q. Did you have any postgraduate work in the American Medical University?

A. It was a general course, not postgraduate course.

Q. I say, did you have any postgraduate course?

A. No, not here in this country but I have taken a special course in London.

Q. And what was that, Doctor?

A. It was for internal diseases at the College University Hospital in London.

Q. And how many hours did that course cover?

A. It was for six months, five days in a week.

Q. Now, Doctor, do you specialize in any particular physical condition?

A. No. I am a general practitioner.

282 Q. You don't specialize in the treatment of obesity?

A. No, I do not.

Q. Did you ever treat any obese cases?

A. Yes, I have.

Q. And how do you treat them, Doctor?

A. By putting them on diet and giving them iodine or thyroid glands.

Q. Or what?

A. Thyroid. That the principal is iodine.

Q. Before you put them on iodine and thyroid, do you give them a physical examination?

A. Sure I do.

Q. And what do you give them a physical examination for?

A. Now, if I see that the patient has T. B., pulmonary T. B., I don't put them on a reducing diet.

Q. Would you give them iodide?

A. No, I do not give them.

Q. Why not?

A. Iodine is against it.

Q. What?

A. Is against it. Is against T. B.

Q. Is it harmful in T. B.?

A. Yes, positively it is harmful. And if the patient is anemic also—

Q. Is what?

283 A. Is anemic. There is a kind of anemia where the patient looks robust but the blood is poor.

Q. Would you give such a person iodine?

A. No, I do not.

Q. Why not, Doctor?

A. It is against it.

Q. Harmful?

A. Yes, harmful.

Q. Any other patients that you wouldn't give iodine to in the treatment of obesity?

A. No, these are the two cases. If the patient has heart trouble again I don't put them on a reducing diet.

Q. Would that be harmful?

A. Yes, it will.

Q. Suppose they have diabetes, Doctor, would you put them on a reducing diet?

A. To a certain degree, I will put them. I will limit their intake.

Q. Would you give them iodine?

A. No.

Q. Why not, it would be harmful?

A. There is no special need for it.

Q. It might be harmful to those patients.

A. It does not hurt but there is no indication for iodine in that case.

Q. Doctor, you have had no special courses in your medical training on the treatment of obesity, have you?

284 A. Yes, as a general course.

Q. But no special courses?

A. No special course.

Mr. PINKUS. I object to that question.

Assistant SOLICITOR. On what ground, Mr. Pinkus?

Mr. PINKUS. On the ground that this Doctor has been qualified as an expert; on the ground that every doctor must in his studies study obesity; on the ground that a doctor can treat obesity with just general practicing.

Assistant SOLICITOR. That isn't any ground for objecting to the admission of the question. That goes to what we call the weight of the testimony. That's a perfectly competent question to ask.

By Mr. MANHERZ.

Q. Doctor, I don't believe Mr. Pinkus asked you, but are you familiar with the drugs in Kelp-I-Dine?

A. Yes, I have seen the report of the examination of the —bacteriological examination, yes.

Q. And what are the ingredients in Kelp-I-Dine?

A. It contains sodium, potassium—

Q. How much?

A. I don't know the percentage. —magesium, copper, iodine—

Q. How much?

A. I don't know the percentage.

285 Q. Iodine?

A. Yes.

Q. How much?

A. One-third of a milligram in half a teaspoon.

Q. Is that a very small amount, Doctor?

A. Yes, it is very small.

Q. Is that considered a therapeutic dosage in medical practice—ordinarily?

Mr. PINKUS. I object to that statement. He has already admitted that would cause a reduction in weight, that amount.

Assistant SOLICITOR. Mr. Pinkus, I should explain to you that a question is competent unless for some legal reason—it isn't a matter of what he has already testified, it is a matter of whether that question is properly asked. Now, just because he may have testified something else that isn't any reason for objecting to it. That's a competent question and I so rule.

By Mr. MANHERZ.

Q. Doctor, I don't believe you answered that question.

A. It is rather a small dose.

Q. Do you know what the regular pharmacopoeia dosage is of iodine?

A. Yes, I know.

Q. What is it, Doctor?

A. It is about 25 milligrams, and we don't use it internally. You know, in the pure form. Always we use
286 the salt of it. We never use the pure form of iodine.

Q. Doctor, is the regular dosage prescribed in the United States Pharmacopoeia prescribed three times a day?

A. Yes.

Q. And what would that amount to in a daily dosage?

A. Now, it differs you know, just what kind of salt we are using. We don't use the iodine directly in the pure form, the metallic form. We use the salts of it. Potassium iodide or sodium iodide is generally used when we want to use iodine.

Q. Which is in this Kelp-I-Dine?

A. I know it's the metallic form.

Q. The metallic form?

A. Yes.

Q. What makes you think this is metallic, Doctor?

A. It is not combined with any other salts. That's the report at least.

Q. Do you know the source of the iodine in Kelp-I-Dine?

A. Yes; sea weed it's from.

Q. Now, what is the daily dosage prescribed in the United States Pharmacopoeia of iodine?

A. We don't use iodine, the metallic form, internally.

Q. Well, isn't it prescribed—

A. (Interposing) As sodium iodide it's about a gram.

- Q. All right. What is the dosage of that prescribed?
 A. One gram a day. Sodium or potassium iodide.
- 287 Q. And how many milligrams is that, Doctor?
 A. Iodine we don't use internally.
- Q. Doctor, I would like to know how many milligrams that is.
 A. Sodium iodide, it's about 22 milligrams.
- Q. 22?
 A. 22 or 23, something around that, yes.
- Q. Well, how many milligrams in one gram?
 A. 100 milligrams.
- Q. Doctor, I believe you said that the iodine in this preparation was metallic?
 A. Metallic, yes.
- Q. Doctor, what is a mineral?
 A. A mineral?
- Q. Yes.
 A. Inorganic salts. All inorganic salts are called usually mineral.
- Q. Well, is a mineral the same as a metal?
 A. Yes, you can call that.
- Q. Is iodine a mineral?
 A. No, it is not a mineral.
- Q. Well, is it a non-metallic element?
 A. Yes. No, it's metallic.
- Q. Doctor, in what form does it occur in sea weed, if you know, the iodine?
 A. Metallic form it occurs.
- 288 Q. Is that the only form it occurs in seaweed?
 A. Yes.
- Q. Is that organic or inorganic?
 A. It is inorganic.
- Q. Now, in what form is inorganic iodine present in kelp?
 A. In thyroid glands, in glands, in ash, in animal kingdoms.
- Q. Do you know, Doctor, what form iodine is present in seaweed?
 A. In metallic form.
- Q. Well, can you name its compounds?
 A. No, it's not compound, it's metallic, pure form.
- Q. Do you know whether or not it is sodium or potassium iodide?
 A. Yes, I know. Sodium and potassium iodide is manufactured after getting the metallic iodine from seaweed.
- Q. Doctor, now what form of iodine is present in seaweed, kelp?

A. Inorganic metallic form.

Q. Now, what form of inorganic iodine?

A. Organic iodine is usually found in animal kingdoms, in thyroid gland.

Q. Now, Doctor, what form of inorganic iodine is present in kelp?

A. Just the pure metallic form.

Q. The pure form?

289 A. Yes.

Q. Pure iodine?

A. Yes.

Q. Do you give it that way to your patients?

A. Usually we do not.

Q. Does any medical books that you know prescribe its use in that way to patients?

A. No.

Q. What percentage of iodine is present on the average in kelp, if you know?

A. Three tenths of a milligram in half a teaspoonful.

Q. Do you know what percentage of mineral ingredients are present in kelp?

A. I don't know that.

Q. Outside of iodine.

A. Yes, I don't know that.

Q. What other ingredients are present in kelp, if you know?

A. There are sodium, potassium salts, copper salt, iron salt, magnesium salt, manganese salts. These are almost all the inorganic ingredients that we need.

Q. What else is present in kelp beside the minerals, if you know?

A. I don't know that.

Q. Do you know the weight of a half teaspoonful of dried kelp?

A. Yes.

290 Q. What would that be?

A. In about 3 grams— In 3 grams of Kelp-I-Dine there is three tenths of a milligram.

Q. Would you accept 2 grams as being about right for a half teaspoonful?

A. No. Usually it is counted $2\frac{1}{2}$ to 3 grams.

Q. A chemist weight, would you accept that as 2 grams of chemist weight?

A. No, more than 2. It is $2\frac{1}{2}$ and 3. Between $2\frac{1}{2}$ and 3 it is. One teaspoonful is counted between 5 and 6 grams so the half is—

Q. Is that a heaping teaspoonful?

A. Yes.

Q. Well, if it is a level teaspoonful it might be less than—half of a level teaspoonful would probably be 2 grams?

Mr. PINKUS. I object to that question.

Assistant SOLICITOR. What is the basis of your objection?

Mr. PINKUS. The basis is that we have agreed with the Post Office chemist on the complete contents of iodine and we accept what their chemist said as to how much iodine is in kelp.

Mr. MANHERZ. That's true, Mr. Solicitor, but I want to show in so much Kelp-I-Dine given daily how much iodine is secured by the user. Unless I ask him these questions, even admitting that the ingredients are agreed to by both the Government and the respondent, unless we find
291 out how much iodine is secured from this particular dosage the formula wouldn't help us any.

Assistant SOLICITOR. Then you have the right to test the Doctor's knowledge too as to whether he knows how much there is. I overrule your objection, Mr. Pinkus. Answer the question, Doctor.

By Mr. MANHERZ.

Q. How much iodine would there be in one-half of a level teaspoonful of Kelp-I-Dine?

A. Three tenths of a milligram.

Q. Now, do you know what proteins are present in kelp or Kelp-I-Dine?

A. Yes.

Q. What are they?

A. They are the salts that I mentioned.

Q. Well, those are the salts, are they not?

A. Yes.

Q. Now, what proteins are in kelp or Kelp-I-Dine?

A. No proteins.

Q. How much carbohydrates in there?

A. I don't know anything about that. I have not made an examination. I don't know that.

Mr. PINKUS. I object against that question too on the grounds that we made no claim that it has carbohydrates, and he is asking something that is irrelevant.

292 Assistant SOLICITOR. I think he has the right to show though whether there are any carbohydrates and—

Mr. PINKUS. All right, I withdraw my objection.

Assistant SOLICITOR. —he has asked the Doctor that question. The Doctor answered the question, did he not?

Mr. MANHERZ. You said you did not know?

The WITNESS. No, I don't know what it contains.

By Mr. MANHERZ.

Q. Do you know if there are any fats in Kelp-I-Dine?

A. No, I don't know that.

Q. Doctor, have you ever tested Kelp-I-Dine yourself?

A. Yes, I have done.

Q. How have you tested it?

A. Just I have put it in my mouth and swallowed it with a little drop of water.

Q. Well, have you ever prescribed it?

A. No, I have not.

Q. You didn't make any attempt to make any scientific test of it, did you, Doctor?

A. No, I have not done.

Q. Doctor, what are hemicelluloses?

A. What is it?

Q. What are hemicelluloses h e m i c e l l u l o s e s ?

Mr. PINKUS. Will you let the Doctor look at the word?

The WITNESS. If I looked at the word—

293 Assistant SOLICITOR. Can't you write the word out for him?

The WITNESS. Whatever I am getting the meaning, hemicelluloses?

Mr. MANHERZ. Hemicelluloses. Do you now the word?

The WITNESS. No, I don't know that.

Mr. MANHERZ. What are pentosans p e n t o s a n s ?

The WITNESS. I don't that.

Mr. MANHERZ. You don't know that word?

Mr. PINKUS. I think the Doctor would better be able to answer if you wrote the words down and have him look at them.

Mr. MANHERZ. I prefer to ask him.

Assistant SOLICITOR. Spell the second word out for him.

Mr. MANHERZ. I spelled the first one too, Mr. Solicitor, hemicelluloses, he said he didn't know the word. Doctor, is there any agar-agar in kelp?

The WITNESS. I don't know that.

By Mr. MANHERZ.

Q. Doctor, after a full meal how much food and water is ordinarily found in the stomach?

A. In one meal or three within twenty-four hours?

Q. After the taking of one meal— After the eating of one meal what quantity of food and water do you usually find in the stomach?

Mr. PINKUS. You ought to say how long after so the Doctor will be able to answer right.

294 Mr. MANHERZ. Immediately or right after eating your dinner how much substance—food and water—do you find in the stomach, if you know? On the average, do you know?

The WITNESS. It depends on how much he has eaten.

Q. Doctor, do you now how much the average stomach holds?

A. Yes, I do.

Q. How much?

A. About one and a half pints.

Q. Doctor, how much iodine does a person need to keep his thyroid functioning normally?

A. I think it is impossible to answer that.

Q. You don't know?

A. I don't know and nobody knows that.

Q. Doctor, do you know whether or not the Food and Drug Administration has prescribed a normal amount for that condition—for that functioning—a daily maintenance dose?

A. We regulate—

Q. I say, do you know?

A. No, I don't know.

Mr. PINKUS. I object against that question. The Doctor has read what it says on here and is familiar with it.

Assistant SOLICITOR. What appears on your label has no connection with the question, Mr. Pinkus.

Mr. PINKUS. What appears on the label is what the Food and Drug Administration has said as so and has approved the label. And the label—

295 Assistant SOLICITOR. (Interposing) Well now, Mr. Pinkus,—

Mr. PINKUS.—says three tenths of a milligram is the daily requirement.

Assistant SOLICITOR. —you shouldn't be interjecting remarks as to what has been done by anybody. Save those until you go to reexamine your witness.

Mr. PINKUS. All right, I am sorry.

By Mr. MANHERZ.

Q. Doctor, what is the normal iodine content of the blood? Do you know?

A. No, I don't know that.

Q. Your answer is "I don't know"?

A. I don't know.

Q. Doctor, do you know what the average dosage of iodine is prescribed in the United States Pharmacopoeia? Or did you answer that question; I believe you did.

A. You asked me that, yes.

Q. Doctor, how much sodium iodide is prescribed or potassium iodide is prescribed daily in the Pharmacopoeia?

A. One gram three times a day.

Q. One gram three times a day?

A. Yes. That's the average dose.

Q. How does that compare with the iodine in Kelp-I-Dine? The quantity I mean?

296 A. It's bigger. It's a big dose.

Q. How much bigger?

A. Sodium iodide contains 18 milligrams in 1 cc; potassium iodide contains 22 milligrams in 1 cc, so say about three times smaller. No, about 50 or 60 times smaller. It's one-third of a milligram. It's about 50 or 60 times smaller.

Q. About 50 or 60 times smaller in Kelp-I-Dine?

A. Yes.

Q. I don't know whether I asked you this before or not, but do you know how many milligrams there are in a gram?

A. Yes.

Q. How many?

A. One thousand milligrams in a gram.

Q. One thousand?

A. Yes.

Q. If you said a hundred before you wish to change your testimony to a thousand, is that correct?

A. If I said it I am wrong. 1 gram is equal to 10 decigrams, 100 centigrams, and 1000 milligrams.

Q. 1000 milligrams?

A. Yes. I mean 1000 milligrams, if I said it I'm wrong.

Q. Then, Doctor, in connection with your testimony about comparing the amount of iodine in Kelp-I-Dine with the dosage prescribed in the United States Pharmacopoeia.

A. Yes.

Q. What would be the difference in daily dosage?

297 A. It is very small this one.

Q. There's three tenths of a milligram in Kelp-I-Dine?

A. Yes.

Q. And what is the daily dosage prescribed by the Pharmacopoeia of iodine?

A. It don't prescribe directly iodine. I've been practicing 36 years in my life and I have never practiced it. I don't prescribe direct iodine—metallic iodine.

Q. Doctor, I think you testified that the Pharmacopoeia stated a daily dosage, did you not? An internal dose.

A. Internal dosage not direct dose. Sometimes even in the form of salt, you know, sodium iodide or potassium iodide.

Q. Now, how much of that was prescribed in the Pharmacopoeia?

A. Three grams, 1 gram three times a day.

Q. Now, 3 grams as compared with the amount of iodine you secure from kelp, how many times—how much difference is there in the dosage?

A. The average dose that we use in medicine is 50 or 60 times bigger.

Q. Doctor, what is an algae?

A. An algae is sensitiveness against something.

Q. You mean in the feeling of the body, sense of fear? Algae a l g a e.

A. Algae, I understood—

Q. (Interposing) Not allergy, an algae a l g a e.

A. Analgesia means relieving pain.

298 Q. You are not thinking of analgesic, are you?

A. Analgesic, that's relieving pain.

Q. All right. Now what's an algae a l g a e, do you know?

A. No, I don't know that.

Q. Doctor, can you name the recognized mineral deficiency diseases?

A. Yes.

Q. What are they?

A. Osteomalacia, for example.

Q. What is that?

A. Osteomalacia; that is some sickness in the bones.

Q. What mineral is lacking in that disease?

A. All the minerals it lacks and vitamins with them. And myeloma diseases.

Q. What?

A. Myeloma. A kind of myeloma.

Q. What mineral is deficient in that?

A. Osteomalacia, that's osteomalacia.

Q. Well, what minerals are deficient?

A. Every kind of minerals.

Q. What specific mineral deficiency is present in that disease?

A. Syphilis?

Q. In mineral deficiency diseases can you name any in which there is a particular mineral deficiency?

A. Yes; rickets for example, rachitis.

299

Q. What's the word?

A. Rickets, you know, in children?

Q. Rickets?

A. Yes, rickets.

Q. What minerals are deficient?

A. Every kind of minerals.

Q. Doctor, do you consider yourself an expert in the field of nutrition?

A. I am a general practitioner.

Q. Do you consider yourself an expert in the field of metabolism?

A. No, I am not expert.

Q. Do you consider yourself an expert in the treatment of glandular diseases—endocrine glandular diseases?

A. No, I can't claim that.

Q. Doctor, can you name the endocrine glands?

A. Glands?

Q. The endocrine glands.

A. I do not understand the first word.

Q. Can you name the endocrine e n d o c r i n e glands?

Mr. PINKUS. May I ask something? You means the glands of internal secretion?

Mr. MANHERZ. Do you know what the endocrine glands are?

The WITNESS. Yes, they are glands that have internal secretions.

Mr. MANHERZ. Thank you, Mr. Pinkus. Name them?

300 The WITNESS. Pituitary gland, thyroid gland, thymus gland, adrenal gland, and even livers. And testicles also and prostates also if you want.

By Mr. MANHERTZ.

Q. And the prostrates—

A. Yes, even prostate. It is supposed to have some kind of internal secretion.

Q. What's the name of the hormone that the prostate secretes, Doctor?

A. The hormones, every gland has special hormones—ovarian—

Q. What hormone does the prostates secrete, if you know?

A. We don't know that but we have many strong reasons to believe that the prostate also has an internal secretion.

Q. I say, do you know what secretion the prostate—

A. No; it has some kind of hormone, yes.

Q. Doctor, can you tell us what happens in metabolism of fat after it reaches the stomach?

A. Yes, I know.

Q. What?

A. It turns into aminoacids.

Q. Are there any aminoacids in fat, Doctor?

A. Amino—

Q. Are there any aminoacids in fat?

A. There are glycerite, aminoacids and others.

Q. Doctor; isn't it true that only proteins have aminoacid?

301. A. No; besides that fat also they contain glycerite, and there is end products in assimilation they term them.

Q. Doctor, what is neutral fat?

A. I don't know that word.

Q. What fatty acids are present in fat?

A. There are several kinds of fat, butyric, stearic fats and some other kinds also.

Q. Now, what fatty acids are in fat?

A. This kind you know, but butyric or the stearic, or glycerite.

Q. Doctor, would you agree that fat is composed of stearic, palmitic and oleic acids?

A. Yes.

Q. Doctor, isn't fat changed to fatty acids and glycerin in the process?

A. Yes, in the end products.

Q. Mineral has no relation to aminoacids, does it?

A. It has—it does.

Q. What is aminoacid, doctor?

A. Aminoacids are supposed to be the end products of the proteins but perhaps also they have in the end products some aminoacids.

Q. Doctor, what are the component parts of fat, the chemicals composing fat? Do you know?

A. No, I don't know.

Q. Doctor, what is tyrosine?

302. A. Tyrosine, one of the ingredients found in the thyroid gland.

Mr. PINKUS. You mean thyroxin?

Mr. MANHERZ. Tyrosine tyrosine.

The WITNESS. C i n e — s i n e tyrosine. One of the products of the thyroid gland.

By Mr. MANHERTZ.

Q. Is that a common aminoacid?

A. No, I don't know that.

Q. You don't know?

A. No.

Q. What is it composed of?

A. I don't know.

Q. Doctor, is there any tyrosine in kelp, or don't you know?

A. No, I don't know that.

Q. Doctor, what is the difference between the thyroid in kelp and that in the thyroid gland, if you know? Excuse me, I want to change that question. What is the difference between the iodine in kelp and the iodine in the thyroid gland?

A. One is organic and the other inorganic.

Q. Do they have the same effect.

A. No, positively no.

Q. Doctor, how much thyroxin does the normal thyroid secrete daily, if you know?

303 A. I don't know that.

Q. Sir?

A. I can't tell that. I don't know.

Q. Doctor, what is the average dose of dried thyroids daily? The average daily dosage of dried thyroids?

A. Yes. 5 centigrams in a day.

Q. Can you give it to us in milligrams, Doctor?

A. 5 centigrams makes—it makes about 50 milligrams.

Q. 50 milligrams?

A. Yes.

Q. About one grain?

A. Yes.

Q. Doctor, what dose of dried thyroid is necessary to increase the metabolism of the normal obese person without any thyroid disease?

A. Thyroid gland you mean?

Q. Yes, sir.

A. We don't use that internally. From 5 to 10 centigrams.

Q. Didn't you say, Doctor, you used it with your obese people? Didn't you say you used it with obese patients?

A. Yes, I said that.

Q. Well, how much did you administer?

A. From 5 to 10 cc I said—centigrams.

Q. Daily, or was that a dose?

A. No, daily.

Q. How many grains is that?

304 A. From 1 to 2 grains.

Q. Now, how much did that raise or increase the metabolism, Doctor?

A. I can't say that.

Q. Are you sure that it raised the metabolism at all?

A. It does. It increased metabolism.

Q. Well, how did you determine that?

A. We have a special instrument to measure that. We can tell by it.

Q. Did you measure any of your patients by that special instrument?

A. Yes.

Q. And what instrument was it?

A. I never give them thyroid gland to increase metabolism, you know, but I know that it does.

Q. Have you ever given iodine to increase metabolism?

A. No.

Q. Doctor, you personally have never made any tests to determine whether or not iodine increases metabolism, have you?

A. I know it from books but I have not tried it myself.

Q. You have never made any tests yourself on any patients?

A. No, I have not myself.

Q. And you have never administered iodine—

A. To increase metabolism.

Q. —to increase metabolism?

A. Yes.

305 Q. Sir?

A. Yes.

Q. You say you have not?

A. Yes, I have not.

Q. Doctor, you refer to certain books that you say you read—

A. Yes.

Q. —that iodine does increase. Do they say what dosage was administered?

A. One dose?

Q. What was the quantity of the dosage? What dosage was administered to increase the metabolism about which you read in certain books?

A. From half a gram to one gram, three times a day, it increases.

Q. And then did it say how much it increased the metabolism?

A. I don't know how much it increases, you know, I can't say that.

Assistant SOLICITOR. Was his answer half a gram to one gram three times a day?

The WITNESS. Yes.

Mr. MANHERZ. One-half to one grain three times a day.

Assistant SOLICITOR. Gram not grain.

Mr. MANHERZ. Grams?

The WITNESS. Gram, that's 15 grains.

Mr. MANHERZ. Yes, that's right, Doctor.

306 By Mr. MANHERZ.

Q. Doctor, what is Basedow's disease? Basedow Basedow.

A. Goiter disease. That's the goiters.

Q. What kind of goiter, Doctor?

A. Exophthalmic goiters.

Q. Is anything else present? Is there hyperthyroidism with the exophthalmic goiter?

A. No; hypothyroidism is different.

Q. I said hyperthyroidism.

A. Hyperthyroidism, yes; exophthalmic goiter that is.

Q. Doctor, in that type of case would the administration of iodine reduce the metabolism?

A. Yes, it will reduce the metabolism.

Q. In other words, Doctor—

A. (Interposing) That you know, just now. Let me see, it regulates the secretion of glands to keep the metabolism at balance.

Q. Well, if it is already at balance then what does it do?

A. No, it is not balanced. In exophthalmic goiters it is not balanced. That balance is disturbed.

Q. Now, in the normal person—

A. (Interposing) It's balanced, yes.

Q. Now what does it do in the normal person where the metabolism is balanced?

A. Yes.

307 Q. What does the administration of iodine do?

A. It increases the metabolism.

Q. And what does it do in cases where it is too high?

A. It exaggerates.

Q. Well, in hyperthyroidism does the administration of iodine increase the metabolism?

A. No, it keeps the balance. The balance is disturbed there, you know.

Q. Well, in hyperthyroidism isn't the metabolism greater than normal?

A. Yes, it's greater.

Q. And when you administer iodine what does it do to the metabolism?

A: It balances the glandular secretions of the glands and in that way the metabolism comes down.

Q. In other words, Doctor, the only result is that it decreases metabolism, is that true?

A. In hyperthyroidism it decreases.

Q. It decreases?

A. In hyperthyroidism, yes.

Q. Doctor, what is the basal metabolism rate of patients who have lost practically all of their thyroxin producing cells, if you know?

A. I don't know that.

Q. A person with hypothyroidism or myxedema, what is their metabolic rate?

308 A. Myxedema and hyperthyroidism are totally different.

Q. Hypothyroidism.

A. Hypothyroidism. In hypothyroidism the metabolism is—

Mr. PINKUS. Could he say it is either low or high?

The WITNESS. —It is low.

By Mr. MANHERZ.

Q. How low can it go with practically all the cells not secreting? When most of the thyroid is removed by surgery, how low does the metabolism rate usually go?

A. I don't know that. I can't say that now.

Q. Would you expect in such cases that iodine would do the same thing as dried thyroids?

A. Yes.

Q. Is it a different form of iodine?

A. There are organic forms and inorganic forms.

Q. Are the two different, the iodine and the thyroxin—dried thyroid?

A. In the dosage they are different. In their effects they are different.

Q. In effects?

A. In their effects. Organics are more effective than the inorganics.

Mr. PINKUS. You mean that the—

Assistant SOLICITOR. Now, let him say what he means, Mr. Pinkus. You can ask him further questions later.

By Mr. MANHERZ.

309 Q. Doctor, isn't it true that the iodine taken into the system has to be changed by the thyroid into thyroxin before it can have any effect on metabolism?

A. We don't know that surely. We are not—

Q. Well, do you know?

A. No, I don't know that.

Q. Doctor, isn't it true that the change of iodine when taken into the system is very gradual, in its change to thyroxin?

A. Yes, it is gradual.

Q. It takes weeks, doesn't it?

A. Yes.

Q. You wouldn't expect any effects in a couple of days?

A. No.

Q. So Doctor if any reduction in weight was secured by a person taking iodine in the first two weeks—taking kelp in the first two weeks—wouldn't be due to the iodine effects in the kelp would it?

A. It may have its effects—it's kelp—but diet is the most important.

Q. Well, Doctor, isn't it true that if a person took Kelp-I-Dine and also followed this diet would obtain the same or similar results as a person who just took the diet? Isn't that true? That a person who takes the diet—this diet prescribed—would get the same effects in reduction in weight as a person who took the whole business; isn't that true now, Doctor?

310 A. No, in this case the patient is taking extra minerals and extra iodine dose.

Q. Well, Doctor, do minerals reduce obesity?

A. No.

Q. Well, I am asking you then, in the presence of—This is a severe diet, is it not?

A. Yes, a severe diet.

Assistant SOLICITOR. When you speak of "this" with reference to the diet you are talking about Government Exhibit 3-H, are you not?

Mr. MANHERZ. I have reference to the diet that is set out in this case.

By Mr. MANHERZ.

Q. You are familiar with that, are you Doctor?

A. Yes.

Q. Was that what you had in mind when you gave your answer?

A. Yes.

Q. That's a rigid diet, isn't it?

A. Yes, it's a rigid diet.

Q. Doctor, how much heat is produced by the metabolizing or the burning up of one gram of adipose fat—tissue?

A. I can't say that by heart you know.

Q. Sir?

A. I can't say it.

Q. You don't know?

A. I don't know.

311 Q. Doctor, if a person lost one pound in weight how many calories would he have to reduce in his diet to accomplish that result? Do you know?

A. I don't know that. Not necessarily is it—

Q. I say, do you know?

A. No, I don't know.

Q. Doctor, what is a large calorie?

A. That we need.

Q. Sir?

A. You mean that we need in a day, twenty-four hours.

Q. No. Can you define a large calorie?

A. No, I don't know.

Q. Can you define a small calorie?

A. No.

Q. You don't know what they are?

A. (Reply not recorded.)

Q. Doctor, what is a simple colloid goiter?

A. I don't know any disease by that name. There are no diseases by that name.

Q. You don't know of any such disease?

A. There is none. I can insist on it that there is none I heard of under that name.

Q. That you know of, Doctor?

A. No, I don't know. Caloric goiter disease.

Q. You don't know what "colloid" is then, do you Doctor?

A. Yes, I know caloric. But there is no caloric
312 goiter disease. There are no diseases under that name.

Q. I mean colloid colloid goiter. Do you know that word?

A. Colloid goiters! Yes, I misunderstand. Colloid goiters; yes, I know.

Q. What is that?

A. That's a different kind of degeneration in the thyroid gland, and it is not necessarily increased or high metabolism—exophthalmic goiter or palpitation of the heart—It's the colloidal degeneration.

Q. Isn't it true, Doctor, in simple colloid goiters the metabolic rate is usually normal?

A. Yes.

Q. Doctor, do you know whether or not experiments have been made on animals showing that when deprived of their thyroids they are usually thin? Are you familiar with those tests?

A. Yes, I know that. Even on man.

Q. When deprived of their thyroid they are usually thin?

A. Yes.

Q. Well, isn't it true, Doctor, that the thyroid is the gland of the body that produces the thyroxin or iodine for the system?

A. Yes.

Q. Doctor, do you know of any mineral deficiency diseases which regularly cause obesity?

A. I know a kind of anemia.

313 Q. Anemia?

A. Yes. Adenomus (?), the patient looks robust but they are poor anemic.

Q. Now, what mineral is lacking in that disease?

A. No special mineral. That's a general condition. Anemia.

Q. Anemia?

A. Yes.

Q. Now Doctor what I want to know is do you know of any mineral deficiency disease that causes obesity?

A. No, I don't know.

Q. Doctor, isn't it true that the textbooks generally agree that obesity and overweight are due to overeating?

A. No, not always.

Q. Well, isn't it true that overweight is usually agreed as due to overeating?

A. No.

Q. Well, is obesity due to overeating according to the authorities?

A. In change of life some obesity comes on but obesity is never in the young age due to (word not understood) ovaries.

Q. Due to what?

A. Ovarian glands, the obesity.

Q. Doctor, I don't—

A. In change of life you know when the ovaries cease to act or function then there is some change of life and then a little obese start but this is the only period they get that change.

314 Q. Now, Doctor, I am asking you, isn't it true that the medical textbooks usually agree that overweight is due to overeating?

A. Yes.

Q. There is no difference of opinion about that, is there?

A. No, that's right.

Q. Doctor, is there such a thing as normal fat on the average individual?

A. Yes.

Q. And what percentage of the weight is normal fat—body weight—if you know?

A. I don't know that. I know but it is a long time that I have forgotten it.

Q. Doctor, is the chemical consistency of normal fat any different from that of the overweight fat, if you know?

A. Only in the hydration, you know, it contains more waters in obese persons. That's the only difference.

Q. You wouldn't agree that the fat is all the same?

A. No, I agree that they are the same; only in obese persons they contain more liquid—more waters—that's the only difference.

Q. The question is: Is there any difference in the fat?

A. No, there is not. In the locations it differs, you know, the fat that is around the kidneys it is different from the fat that we have under the skin or around the intestines.

315 Q. Now, how much water is in fat of obese tissue, if you know?

A. I don't know that.

Q. Doctor, if the iodine in Kelp-I-Dine actually caused a person to burn up fat by increasing his metabolism, in an overweight person, wouldn't it also burn up the fat in the normal person; in other words, in that 12 per cent or whatever the normal fat is?

A. If it is taken in an overdose it will.

Q. Well, if he just takes three-tenths of a milligram it wouldn't, would it?

A. No, it will not.

Q. Well, Doctor, do you mean to say that the iodine would have a different effect upon normal fat and the obese fat or overweight fat?

A. No.

Q. No difference?

A. No difference.

Q. Doctor, you wouldn't say that the iodine in Kelp-I-Dine has any effect on the appetite would you?

A. I should say, you know, it will increase the appetite a little. Will increase the metabolic process—peristaltic movement of the intestines and in that way it will increase the appetite.

Q. Increase the craving for food?

316 A. No, not that one. It's a general appetite, the ordinary healthy sensation.

Q. Doctor, do you know what effect three-tenths of a milligram of iodine would have on the metabolic weight of the normal individual?

A. It will slightly exaggerate the metabolism.

Q. How slightly?

Q. We don't measure anything. We have no—

Q. Doctor, you mean you don't know?

A. I don't know.

Q. You have no way of measuring that, do you?

A. (No reply recorded.)

Q. Doctor, how does the iodine in Kelp-I-Dine increase metabolism, if you know?

A. By the action of iodine that it contains.

Q. What does it act on?

A. Iodine acts on the general metabolism, and increases it.

Q. What dosage? Are you speaking of the dosage in Kelp-I-Dine, three-tenths of a milligram?

A. Now, you asked me about iodine and now you ask me. Iodine according to the Modern Medica or the Pharmacopoeia that we have on hand increases the metabolism of the body and iodine in the Kelp-I-Dine also because of its small amount increases slightly the metabolism of the body.

Q. Doctor, the Pharmacopoeia doesn't say what iodine does, does it?

317 A. Sure, positively it says.

Q. The United States Pharmacopoeia?

A. The United States Pharmacopoeia, yes.

Q. Does that contain the action of drugs?

A. Yes, Pharmacopoeia, yes.

Q. Isn't it true, Doctor, that the United States Pharmacopoeia shows only the dosage and not the effects of drugs?

A. It does. Usually it tells about its origin, how it is manufactured, but about its action also is in there.

Q. Therapeutic effects?

A. Not in detail but main effects of it is written there.

Q. On the body?

A. On the body, sure on the body.

Q. Doctor, would you say that kelp if it really increased the metabolism in everybody whether they had normal or abnormal thyroid, wouldn't that be considered dangerous?

A. No.

Q. You think it should be sold indiscriminately to the public?

A. Yes, it can be sold to the public.

Q. Do you think dried thyroids should be sold indiscriminately to the public?

A. No.

Q. What is the difference between the effects—

A. (Interposing) The iodine it contains is very small but in the thyroid the dosage is big.

318 Q. Doctor, isn't it true that thyroid cannot be purchased by the public without a medical prescription?

Isn't that generally true, if you know?

A. I don't know that.

Q. Well, you do know that it requires a prescription to get thyroid, don't you Doctor?

A. I don't know that.

Q. You don't know?

A. I think they can get it without any prescription.

Q. But you don't know that it can be, do you Doctor?

A. I don't know. I am not sure.

Q. Doctor, do you know what a calorie is.

Mr. PINKUS. That question was asked before.

Mr. MANHERZ. Did you answer that or did you say I don't know.

The WITNESS. You asked me about big calories and small calories. I don't know the difference but I know what calorie is. You asked me what is a big calorie and I said I don't know a big calorie and a small calorie.

By Mr. MANHERZ.

Q. Which one do the food tables use, Doctor, do you know?

A. Just ordinary calories.

Q. How many calories, Doctor, are there in the average slice of bread, if you know?

A. In a gram?

Q. In the average slice of bread.

319 A. I don't know that.

Q. How many calories, Doctor, in one egg, if you know, of an average size egg?

A. 75 or 76 calories.

Q. How many calories in one ounce of milk?

A. I don't know.

Q. Doctor, did you figure the number of calories in this fixed menu prescribed in this course—in this treatment?

A. Which one you mean?

Q. Did you measure the calories—

A. No, I did not.

Q. Where did you get the figure you stated, was that furnished you by Mr. Pinkus?

A. Yes; I saw it in the papers.

Q. Doctor, do you know what a calorimeter is?

A. Calorimeter—

Q. Calorimeter, do you know what it is?

A. Yes, I know.

Q. What is it?

A. An instrument to measure the calories.

Q. Have you ever made any tests with the calorimeter?

A. It is not in my line.

Q. You never made any tests with the calorimeter?

A. No.

Q. Do you have a basal metabolic machine in your office?

A. No, I have not.

320. Q. What is the principle of the basal metabolic machine?

A. Consumption of the oxygen. By it we measure the metabolism.

Q. Compared with what, Doctor?

A. Compared to—

Q. What do you compare it with?

A. By the quantity of the oxygen we measure that.

Q. Doctor, isn't it true and generally agreed that the metabolic rate of a fat person is normal?

A. Yes, as long there is no disease. Yes, it is normal.

Q. Doctor, have you ever made any controlled tests of persons taking a fixed diet where some used kelp and others not?

A. No, I have never tried that.

Q. Have you ever used iodine?

A. No.

Q. Doctor, do you know what a maintenance diet of calories would be required for a person at bed rest? Day and night.

A. At rest or at working?

Q. At bed rest, day and night.

A. About 2 thousand calories.

Q. About 2 thousand at bed rest?

A. Yes.

Q. Now, the normal person in his daily activities what is the—

A. (Interposing) 3 thousand.

321 Q. Doctor, how do you arrive at your answer that the following of the diet in this case will reduce an individual from 3 to 5 pounds per week?

A. I see the report of Dr. Craster.

Q. Doctor who?

A. Doctor Craster. That's the principal—director of the Board of Health of Newark. I have seen his report.

Q. On what, Doctor?

A. Kelp-I-Dine.

Q. I am asking you, Doctor, how you arrived at the—

A. (Interposing) I have seen the doctor's report. I came to that conclusion by his—

Q. (Interposing) Well, he didn't make any test did he, Doctor?

A. I don't know that.

Q. Did you accept it without making any—

A. (Interposing) Yes, I did.

Q. You have never tested Kelp-I-Dine yourself, Doctor?

A. No, I have not.

Q. You never made any controlled tests of the diet?

A. No.

Q. Doctor, if a person observed the diet prescribed in this case consistently would you say that they would lose the same weight, approximately?

A. Yes, approximately.

322 Q. They would lose from 3 to 5 pounds if they followed this diet?

A. No, I can't say that.

Q. Well, what would they lose?

A. They may lose, you know. I can say they may lose some pounds but I can't say how many pounds because I have not seen anything in the record about it.

Q. Well then, you can't say how many pounds this—

A. (Interposing) It runs about 3 to 5 pounds a week.

Q. Now, Doctor, if a person observed this same diet can he lose the same weight without the rest of the treatment?

A. No, a little less perhaps because Kelp-I-Dine contains a little iodine in it and it may help reducing the fat a little faster.

Q. Well now Doctor, I asked you before how much the metabolic rate would be raised by the taking of three tenths of a milligram of iodine a day, and you said you didn't know.

A. Yes, I said I did not know.

Q. You don't know whether it is raised at all or not, do you, as a matter of fact?

A. No, I know that it raises.

Q. Well, how much of a raise is it?

A. I don't know that, but it raises, a small amount.

Q. Would you say the amount is insignificant?

A. No.

323 Q. How many calories are burned up by the addition of three tenths of a milligram of iodine?

A. I can't say that.

Q. You don't know?

A. No.

Q. How many grams of fat would be burned up by the addition of three tenths of a milligram of iodine to the daily diet, if you know?

A. I don't know that.

Q. You don't know if it would burn up any?

A. It will.

Q. How much?

A. I don't know how much.

Q. Are you speaking of large doses of iodine, Doctor?

A. No, small doses. You know, large doses have larger effects and small doses have smaller effects. It's natural.

Q. Doctor, have you ever seen any authority in your opinion that prescribed three tenths of a milligram of iodine as a dose?

A. No.

Q. Have you ever seen any medical textbook or authority that prescribed three tenths of a milligram of iodine daily to increase metabolism?

Mr. PINKUS. I object against that question.

Assistant SOLICITOR. What's the basis of your objection?

Mr. PINKUS. The basis of my objection is that the Doctor looked at the textbook and agreed that three tenths of a milligram is the required amount given to increase

324 the metabolism. Three tenths for a complete day.

One-third of three tenths. He looked at that and agreed in his prior testimony—and agreed after looking at these books that three tenths of a milligram was the rate per day for increasing metabolism in the treatment of obesity.

Assistant SOLICITOR. But counsel for the Government has the right to cross examine him upon that question. He may answer the question; I overrule the objection.

Mr. MANHERZ. Do you remember the question, Doctor?

Mr. PINKUS. Will you repeat the question, please.

By Mr. MANHERZ.

Q. Have you ever seen any medical textbooks that prescribed three tenths of a milligram of iodine daily for the reduction of obesity?

A. No.

Q. Have you ever seen any medical textbooks that prescribed three tenths of a milligram of iodine to raise the metabolic rate?

A. No.

Q. You haven't prescribed that dosage yourself, Doctor?

A. No, I have not.

Q. Have you ever prescribed potassium iodide?

A. Yes, many times.

Q. Have you ever prescribed that for asthma or syphilis?

A. Yes.

Q. Have you ever prescribed sodium iodide?

A. Yes.

Q. Did those patients ever take on weight?

A. No.

325 Q. Were they all thin?

A. They were thin or fat.

Q. Was there any difference in their weight by taking the—

A. (Interposing) No.

Q. Doctor, do you know what nitrogen balance means?

A. I don't know.

Q. How many calories are burned up in the average individual in a one mile walk—moderate pace—if you know?

A. I don't know.

Q. Doctor, you never treated obesity, I believe you said, did you?

A. I have treated.

Q. As a separate entity? Have you ever treated obesity as a disease alone?

A. Yes.

Q. And what did you prescribe?

A. Usually I put them on diet and I insist on it.

Q. Did you just put them on a diet alone?

A. Yes, only on diet.

Q. Did they reduce?

A. Yes.

Q. Did they reduce satisfactorily?

A. Yes.

Q. Doctor, have you ever seen any books, dispensaries

or otherwise, that prescribed iodine for fattening people?

326 A. Iodine?

Q. Yes; kelp, seaweed.

A. No.

Q. For fattening pigs for instance. Does the dispensary say that iodine has been used for fattening pigs?

A. I don't know.

Q. Doctor, I believe you stated that you knew some doctors that used this treatment for reducing obesity, did you?

A. I don't know.

Q. Do you know if they use kelp for the reduction of obesity?

A. (No reply recorded.)

Q. Do you know if they use iodine for the reduction of obesity?

A. Yes.

Q. Who?

A. Almost every doctor that I know.

Q. Can you name any doctor?

A. No, I can't give you any names.

Q. Doctor, can you name any textbook that says iodine reduces weight?

Mr. PINKUS. Well, I think—

Assistant SOLICITOR. Let him answer the question himself, Mr. Pinkus.

Mr. MANHERZ. Any medical textbook that says iodine reduces weight.

327 The WITNESS. Not in that terms.

By Mr. MANHERZ.

Q. Can you name any textbook that says iodine increases metabolism?

A. Yes.

Q. In a normal person?

A. Yes.

Q. What textbook?

A. For example, the Handbook of Nutrition written by the American Medical Association.

Q. That doesn't speak about a normal person, does it Doctor?

A. Sure it does.

Q. Well, isn't that speaking of persons who are suffering from iodine deficiency?

A. No.

Q. Doctor, in that book that you mentioned when it referred to increase in metabolism didn't it also say that those test animals increased in weight and put on fat?

A. No.

Q. Don't you know?

A. No.

Q. Sir?

A. No, it does not say anything of the kind.

Q. Did you just read one statement in that test, Doctor, or did you read the whole book?

A. No, all the book; I have seen it; I read it before.

328 Q. Well, Doctor, if that book stated the contrary would you agree that you were mistaken?

A. Yes, I will.

Q. If it stated that animals did increase in weight you would admit that you were mistaken?

A. Yes.

Q. Doctor, you don't mean to say that an increase in metabolism necessarily involved a reduction of weight, do you?

A. No, not necessarily.

Q. Isn't it true that a person may have an increased metabolism and take on weight—eat more and take on weight, isn't that true?

Mr. PINKUS I object against that because we—

The WITNESS. (Interposing) It is a conditional question, you know, that you are asking me. The metabolism may be increased but at the same time may get all nourishment that may put on more weight.

By Mr. MANHERZ.

Q. May he take on more weight—

A. Yes.

Q. —with an increased metabolism?

A. Yes. That takes more nourishment.

Q. Increased his appetite?

A. Increased?

Q. I say, that would increase his appetite wouldn't it?

A. Yes.

329 Q. An increased metabolism?

A. Yes.

Q. And the patient would likely take on more food, would he not—would be inclined to?

A. Yes.

Mr. MANHERZ. I think that is all, Mr. Solicitor.

Assistant SOLICITOR. Mr. Pinkus, before you proceed with

your redirect examination I would like to ask the Doctor one question myself.

By Assistant SOLICITOR.

Q. Doctor, you stated in the early part of your direct examination, that is, your examination by Mr. Pinkus, that a patient following the Kelp-I-Dine diet and taking the Kelp-I-Dine as prescribed would lose from 3 to 5 pounds a week. Did you base that testimony, that statement which you made, entirely upon some other doctor's report which you have seen?

A. Yes.

Q. That wasn't your own opinion at all then?

A. Not mine.

Q. What was your answer to that question?

Mr. MANHERZ. It was not his opinion.

Assistant SOLICITOR. That is not your opinion?

The WITNESS. It was not my opinion. I seen the report of Dr. Craster and that made me to think that the patient that takes—

330 Assistant SOLICITOR. (Interposing) But that was not your opinion?

The WITNESS. No, it is not my opinion.

Assistant SOLICITOR. You may proceed, Mr. Pinkus.

Redirect Examination.

By Mr. PINKUS.

Q. After you looked at the diet and after you looked at the Kelp-I-Dine, did you agree with what Dr. Craster said?

A. Yes, I did.

Q. Was it your opinion that it would lose 3 to 5 pounds a week before you looked at this or when you just looked at Dr. Craster's letter you agreed with him because he is an authority?

A. Yes.

Q. Then after you saw it yourself, the diet and the Kelp-I-Dine, you agreed it would lose 3 to 5 pounds a week?

A. Yes.

Q. Isn't it true that you were just asked questions by the other attorneys that the average doctor would have to look up in books to give the exact answer?

A. Yes.

Q. Isn't it true that when—Well, let me ask you this: How did you come out in your examination—in the Civil Service examination—to take the position of admitting doctor—

Mr. MANHERZ. Mr. Solicitor, I don't think we ought
 331 to go into any further qualifying questions here. I
 understood the respondent was anxious to get back
 to Newark and make the twelve o'clock train. If he is go-
 ing to bring up a new subject I will have to go into that too.
 Assistant SOLICITOR. Well, Mr. Manherz, on cross exam-
 ination there was some question about his further education.
 I believe I will admit the question.

By Mr. PINKUS.

Q. How did you come out in your Civil Service examina-
 tion for position as admitting doctor in the Newark City
 Clinic?

A. I came second in that examination and by it I got that
 job—assigned to that job.

Q. Because you came out second in the examination you
 got the job. Do you agree that taking a half teaspoonful
 of Kelp-I-Dine contains a therapeutic dose of iodine for the
 treatment of obesity?

Mr. RENNIE. I object.

Mr. PINKUS. All right, I will change the question. When
 you looked at this book and you saw that 10 to 15 grains—

Assistant SOLICITOR. I am going to object myself, Mr.
 Pinkus. Ask the Doctor's opinion. Don't ask him whether
 he looked at a book.

Mr. PINKUS. Doctor, in your opinion do you agree with
 the—

Assistant SOLICITOR. Wait just a minute, Mr. Pinkus. I
 don't want you to ask him whether he agrees with anything.

Just ask him what his opinion is on a certain subject.

332 By Mr. PINKUS.

Q. In your opinion is 10 grains of iodine the dose
 for the treatment of obesity taken three times a day?

A. Yes.

Q. In your opinion is .3 milligrams the same equivalent
 of the 10 grains taken three times a day? In other words,
 10 grains of iodine taken three times a day do you agree
 or do you not disagree, or do you believe that 10 grains of
 iodine taken three times a day is the same as .3 milligrams
 of iodine in kelp?

A. No, I don't think so. I think that this three tenths
 of a milligram is small.

Q. In other words, do you agree that three tenths of a
 milligram wouldn't hurt anybody?

A. No, nobody. It would not hurt anybody.

Q. You checked the doses of iodine necessary to increase metabolism?

A. Yes.

Q. Do you agree that one-half teaspoonful of iodine in kelp is a therapeutic dose of iodine to be a small aid even in reducing? In other words, do you agree that one-half—

Mr. RENNIE. I object.

Mr. PINKUS. All right, I withdraw that question.

Assistant SOLICITOR. Ask him what a therapeutic dose is. You must remember he is your witness and you don't have the right to lead him.

333 By Mr. PINKUS.

Q. What is meant by the term "therapeutic dose"?

A. That's the least amount of a dose which brings physiological change or action in the body.

Q. Would you consider three tenths of a milligram a therapeutic dose?

A. Yes, I do.

Mr. PINKUS. I have one other statement to make and I will be through. The only thing I would like to say is that we agree to delete, qualify or change and agree to conform our advertising in the future with any postal regulations that exist or anything that they would even recommend to us. We think that we are honest. I have no other questions to ask the witness.

Mr. MANHERZ. I have one or two questions I want to ask the Doctor.

Recross Examination.

By Mr. MANHERZ. Doctor, what authority do you rely upon for your statement that three tenths of a milligram of iodine is a therapeutic dose? Can you name any textbook that cites three tenths of a milligram of iodine as a daily dosage?

A. Iodine, I stated before, that iodine in its pure form—metallic form—is not used for treatment of obesity.

Q. Well, in any form Doctor, what textbook do you rely upon as your authority that three tenths of a milligram of iodine in any form is a therapeutic dose?

334 A. I came to that decision by conclusion. A big dose, you know, brings on bigger result and you know small dose brings on smaller effect.

Q. Doctor, you have never measured the effects of three tenths of a milligram of iodine?

A. No, I have not.

Mr. PINKUS. One other question.

Mr. MANHERZ. Well, I haven't finished yet.

By Mr. MANHERZ.

Q. You said, I believe, that you had checked the dosage of iodine to raise metabolism when Mr. Pinkus asked you. What book did you check or what book did you refer to when you made that statement that you had checked the dosage of iodine sufficient to raise metabolism?

A. Any general pathological book, you know, in general medicine does that.

Q. Well, Doctor, can you name any general medical book of any kind that says that three tenths of a milligram—

A. (Interposing) No, I can't.

Q. You don't know any book that says three tenths of a milligram of iodine will raise metabolism, do you?

A. No.

Q. In fact, it never said it, isn't that true?

A. Yes.

Mr. MANHERZ. That's all.

335 Assistant SOLICITOR. Do you have any further questions, Mr. Manherz?

Mr. MANHERZ. I think that's all.

Assistant SOLICITOR. All right, Mr. Pinkus.

Redirect Examination.

By Mr. PINKUS.

Q. Kelp in this Kelp-I-Dine form is dehydrated Kelp-I-Dine—dehydrated kelp rather. This is the kind that's dehydrated. When we say it is dehydrated to ten per cent where ninety per cent of the moisture was taken out, what does that mean; does it mean that it has more water than necessary or less?

A. Less.

Q. When kelp enters the body—

Mr. MANHERZ. Mr. Solicitor, he is injecting another element here that hasn't been raised at all, and if he is going into that phase of it—

Assistant SOLICITOR. Let him complete his question and then I can better—

Mr. PINKUS. When kelp enters the body what happens to it with relation to the water in the body; does the kelp swell up or not?

The WITNESS. It absorbs moisture.

Mr. PINKUS. When it absorbs moisture and swells up in the body—

336 Mr. MANHERZ. Mr. Solicitor, this hasn't been covered on direct examination at all and I object to it.

Assistant SOLICITOR. That wasn't brought out at all, Mr. Pinkus, on direct examination. This is merely redirect for the purpose of clarifying anything brought out on cross examination.

Mr. PINKUS. I believe the other attorney said that Kelp-I-Dine or asked the question whether or not it would cause a feeling of fullness.

Mr. MANHERZ. No, I didn't ask that question.

Assistant SOLICITOR. That matter hasn't been discussed this morning, Mr. Pinkus.

Mr. PINKUS. All right. We will conclude our case with the statements that I made previously. No other questions.

Assistant SOLICITOR. Well, I will have to state this, Mr. Pinkus, in reply to your statements that you are willing to conform with the postal laws and regulations and that you would be willing to revise your literature, the Post Office Department does not attempt to censor literature or to revise it for those using the mails. Those using the mails do so at their own responsibility and if they violate the law then and only then does the Post Office step in. So, we cannot revise your literature.

Now, is there anything further, Mr. Pinkus, that you wish to offer.

Mr. PINKUS. Nothing further.

337 Assistant SOLICITOR. Mr. Manherz, does the Government have anything by way of rebuttal testimony?

Mr. MANHERZ. Mr. Solicitor, I haven't got the book here and it will take about ten minutes to get it, but I would like to offer the United States Pharmacopoeia to rebut some of the statements of the doctor witness as to what he said was in there.

Mr. PINKUS. I object to that. You didn't let me present any book and I can't see why you should have to present any book.

Assistant SOLICITOR. Your books are not offered, Mr. Pinkus, for the purpose of contradicting what anybody said was in the book.

Mr. PINKUS. Well, I would like to offer that.

Assistant SOLICITOR. But, the doctors who testified for the Government didn't mention any statement that appeared in any of the books that you have offered.

Mr. PINKUS. I believe they did.

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Assistant SOLICITOR. I believe they didn't, Mr. Pinkus, and I will have to rule that they didn't because they didn't rely—their testimony was not based upon anything in any of those books. Now, on cross examination it was brought out that your witness, whom you have here this morning, relied upon certain statements made in the works Mr. Manherz has in mind and which he mentions that he did rely on them. Now, Mr. Manherz has the right to put those into the record to contradict your witness. Now, neither

338 one of the Government witnesses gave any testimony which they said was based upon any statement in any book that you offered. If they had I would have ruled that you had the right to put those books in to contradict the doctors.

Mr. PINKUS. I believe that you mentioned the book *Pharmaco-Therapeutics Materia Medica*; you mentioned the *Dispensary of the United States*; you mentioned—

Mr. MANHERZ. (Interposing) The only mention, Mr. Solicitor, that Government made is in cross examining this witness and he mentioned certain books which he relied upon as—

Assistant SOLICITOR. What are those two books, let us get that definitely in the record; the ones which you wish to get in?

Mr. MANHERZ. Mr. Solicitor, we will withdraw the offer.

Assistant SOLICITOR. Then the Government rests its case.

Mr. MANHERZ. The Government rests.

Assistant SOLICITOR. That being the case gentlemen and there being nothing further to offer by the Government or the respondent, let the record show that the hearing was adjourned at 11:52 this January 13, 1945.

(Whereupon, the hearing adjourned at 11:52 o'clock a. m. this 13th day of January, 1945.)

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Before the Solicitor for the Post Office
Department

Holding a Fraud Order Hearing

In the Matter of Charges That
AMERICAN HEALTH AIDS COMPANY; ENERGY FOOD CENTER;
both at Newark, New Jersey;

F. & L. Docket 14/303

AMERICAN INSTITUTE OF FOOD PRODUCTS; WALTER H. EDDY;
WALTER H. EDDY, Ph. D.; WALTER H. EDDY, Ph. D., Presi-
dent; DR. WALTER H. EDDY, Ph. D.; and ROBERT A. BORIES,
General Manager, all at New York, New York, are en-
gaged in conducting a scheme for obtaining money
through the mails by means of false and fraudulent pre-
tenses, representations and promises, in violation of 39
U. S. Code 259 and 732 (Sections 3929 and 4041 of the
Revised Statutes, as amended).

Washington, D. C.,
Thursday, February 1, 1945.

Hearing of the above-entitled matter was reopened before
the Honorable Daniel J. Kelly, Assistant Solicitor of the
Post Office Department, in the hearing room of the Post
Office Department, on Thursday, February 1, 1945, at 10:35
o'clock a. m.

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APPEARANCES

On behalf of the Post Office Department: W. V.
RENNIE, Esq., RALPH B. MANHERZ, Esq.

On behalf of the respondents: American Health Aids
Company, Energy Food Center. LOUIS A. FAST, Esq.

. . .

*Colloquy Between Assistant Solicitor and Counsel—Re Ap-
plication to Reopen Case for Further Testimony*

Assistant SOLICITOR. Proceed, Mr. Fast.

Mr. FAST. I served notice by telephone on Mr. O'Brien,
and Mr. O'Brien was willing to accept that kind of service,
that I would appear here this morning for the purpose of
applying for an order or a ruling that we may open the case
for the purpose of including therein additional testimony;
that I am not trying to delay the matter but I will be per-
fectly willing, if the counsel for the Government consents,
that these men if they were here—assuming that your Hon-

or would be willing to have the additional testimony heard —would testify in the manner in which they have testified by affidavits. However, if the ruling should be favorable and you want them down here. I will be very glad to bring them down.

I think that your Honor ought to have every available testimony and all available information in order to see that justice is done in this case and in every other case for that matter. Your Honor has indicated that the proceed-

341 ings here are more or less informal although they are and should be more or less constrained by rules of law and rules of evidence. But, there appears in 3-C a statement under the Kelp-I-Dine plan number 1, "Eat as much food as you want, but don't eat between meals." In going over this matter with my client, since the hearing, he felt that definitely was not a statement that he had given to the printer. He finally got in touch with the printer and the printer went through his mass of documents and was able to find the original, a photostatic copy of which I have annexed to my affidavit, in which he says, among other things, that he has been doing printing for Mr. Pinkus and his allied trade name organizations for at least seven years, and that the exhibit which is annexed is the true order which he got from Pinkus and instead of reading as it did it was, "Eat as much food as you want, but don't eat between meals; that is, as much as you want of the typical suggested Kelp-I-Dine diet. (See reverse side)." When Elman came to print it he found that it was somewhat too crowded —it would make the Exhibit 3-C, particularly the first sentence, somewhat too crowded. So, without consulting Pinkus he swears, as has happened in the past when such situations arose, he used his own judgment and printed under the subdivision, "Eat as much food as you want, but don't eat between meals", and the rest of the sentence was omitted by him from the printing. Now, when you look at the original and the photostat you will see very clearly that situation occurred. He says further that a couple

342 of weeks after he delivered the circulars to Pinkus he came in and told the printer that inasmuch as this mistake occurred he would have to print new circulars and accordingly he prepared a new circular for him, a copy of which we have annexed. I don't see a copy of it. There was a copy. I should have it for I brought it down. In other words, it is Dr. Eddy's circular which I think is in evidence.

I think this matter should be opened and they should be given an opportunity to get this testimony in on the theory that your Honor should have the whole case. The testimony is not yet printed and I don't think there would be any undue hardship to the Government if the matter is opened and they are given an opportunity to come down and testify. That's my application, your Honor. I would like to offer up the affidavits.

Mr. MANHERZ. Mr. Solicitor,—

ASSISTANT SOLICITOR. First, let me ask you Mr. Manherz, have you seen and examined this affidavit?

Mr. MANHERZ. I was just about to state that I have examined the affidavit and the matter attached to it that Mr. Fast has offered. The Government objects to the introduction of that into the evidence in this case for the reason that, in the first place, the evidence clearly shows that the circular, which the respondent seems to feel was improperly printed, was used in this business by Mr. Pinkus. It
343 wasn't sent out by the printer as I understand, except that the supply was furnished to Mr. Pinkus. He had every opportunity to throw the improperly printed circulars in the ash can if he desired to do so. He didn't see fit to pursue that action but instead employed this circular. In my mind there is no question therefore that responsibility for the circular as it was offered in evidence is Mr. Pinkus'.

Secondly, Mr. Solicitor, this case is not essentially based on the circular that Mr. Fast has offered. The case is based on the advertising matter placed in newspapers and magazines and as late as the February, 1945 issue of "Secrets", Government Exhibit 2-A, there is the same statement as appeared in the circulars offered in evidence. So, as I see it, this offer by affidavit to put into evidence some kind of a circular containing some different statement is entirely improper and we object to its introduction. As a matter of fact, every one of the advertisements from the date of August, 1944 up to and including February, 1945, constituting Government Exhibit 2, contain essentially the same statements as appear in the circular which was offered in evidence, Government Exhibit 3-C, and there is no different showing in any of the newspaper or periodical advertisements which go out to the public and upon which an order may be predicated. The circular that Mr. Pinkus refers to only goes out when an inquiry is made as a result of a newspaper advertisement and not if the purchaser

makes a remittance upon the initial periodical advertisement. As a matter of fact, provision for ordering the
 344 product is made in the advertising matter itself, that is, in newspapers and periodicals, as shown by Government Exhibit 2 and sub exhibit numbers. So therefore it certainly is not relevant to show that in post-sale matter some different statement was made. As a matter of fact, Mr. Solicitor, if anything it shows merely that the promoter was more inclined to work a fraud upon the public for the reason that in the initial solicitation—in the newspaper advertising and periodical advertising matter—the prospective purchasers are not informed, not advised, that it is necessary for them to abide by a certain diet prescribed by the Kelp-I-Dine people, the American Health Aids. And not until after their money has been sent in and the product received are they advised that such is the case. I might state, however, that those few people who do make inquiry without sending in an order as a result of the advertisement may receive the circular, Government Exhibit 3-C. So that the Government's case is based on the initial advertising matter and what statements are made in post-sale literature in any event are not material in connection with the advertising matter and the representations which bring about the remittances. In other words, the representations that the remitter has in his hand when he sends in his money are the representations which the Government conceives to be fraudulent and which the evidence shows, I feel, is a fraud.

So I feel that any transaction which occurred between Mr. Pinkus and his printer is entirely outside the record and has no place in this record because Mr. Pinkus
 245 certainly used this literature that he received and it appears to me now that he is merely attempting to place the blame for a fraudulent scheme upon a third party, namely, a printer who, as I understand it, has no part in the actual operation of this fraudulent scheme. It is merely a scheme to try to get out from under a responsibility for the operation of a fraudulent scheme. And even assuming that the circular was admitted into evidence, Mr. Solicitor, it still doesn't take away the fraudulent claims made in the initial advertising matter. I say that the offer to put into evidence some matter concerning the transaction between the promoter and his printer is not pertinent here, has no bearing in the record, no bearing on the case and the Government objects to its introduction.

(Discussion off the record.)

Mr. Fast. Mr. Manherz in his reply suggested that up until February, 1945 there appeared in the magazine known as "Secrets" a certain advertisement. Of course this February advertisement was offered in evidence when we were here last in January but Mr. Manherz didn't read everything it appears. In the quoted portion, as a matter of fact in heavy type, it says "just CUT DOWN on them" which is entirely different from the inference that one could eat as he usually could and still reduce. Now, to show the importance of this testimony it will bear out a statement

made by Mr. Pinkus that they stopped sending out the
346 3-C, but stopped it for an entirely different reason.

It was because, if I recollect his testimony, the Food and Drug Division suggested that it should be cut out. I am not doing this for the purpose of delay. I think that it is in the interest of right and justice that the Court should have everything before it decides the case and that's why I ask that that be admitted in the testimony.

Assistant SOLICITOR. Well, while we were off the record for the purpose of my examining certain exhibits and reading the affidavit I did read the affidavit carefully and I looked at all the exhibits which contain the test correspondence. As I understand the Government's opposition to your motion, Mr. Fast, it isn't to the form of the evidence which you seek to put in the record. I didn't understand Mr. Manherz to object to the fact that it was in affidavit form. As I understand his objection, his opposition or resistance of your motion is based on the fact that if the affiant were here that his testimony would not be admissible under the issues. Am I correct in stating that, Mr. Manherz?

Mr. MANHERZ. Yes, Mr. Solicitor, that's correct.

Assistant SOLICITOR. I didn't understand that he was resisting it on the ground that it was in affidavit form.

Mr. FAST. I didn't raise that point.

Assistant SOLICITOR. But you stated carefully that you weren't seeking delay and I want to get that point straight in the record that he is not resisting the form of it
347 so much as the admissibility of it if the affiant were here to testify.

Now, on examination of Exhibit 3 it shows that a test letter written on, at least dated, July 29th, and as shown by the return of the postmaster at Richland, Pennsylvania, was mailed on July 28th and in reply to that inquiry there was received Exhibit 3-C which is the circular which the respondent now seeks to show should have been amended

or should not have been printed in the form that it was. Now, that circular was mailed on August 14, 1944. There is nothing in the affidavit to show how long these circulars were used. I don't believe there is anything in the record because 3-C is the only one that we show as having been received. Now, in the affidavit it does say "in about two weeks after I had printed them" but he doesn't give any dates of when he printed them or how long they were used. But, nevertheless, is not the advertiser responsible even if his printer does make a mistake, isn't he responsible for what he sends through the mails, Mr. Fast? I want to hear you on that question.

MR. FAST. I think he is. But I think this that your Honor would have a right to consider the bona fides of the individual and that plus the testimony that you had from the lips of Mr. Pinkus that he cut out sending them in the summer of 1944 would, I think, be additional testimony that probably would help him.

ASSISTANT SOLICITOR. Well, the record may show the length of time that was in use. I don't know; it doesn't show at the present time.

MR. FAST. Well, it does.

ASSISTANT SOLICITOR. But I don't want to state the Government's position without having Mr. Manherz approve my statement. I will state the Government's position this way in so far as good faith is concerned. Is it the Government's position, Mr. Manherz, that regardless of the question of good faith, even if the respondent believed in all of his representations if they were as a matter of fact, is it not the Government's position—I mean if they were false as a matter of fact, the representations made although the respondent might have believed in the truth of them, the Government's position would be that a fraud order should issue?

MR. MANHERZ. Yes, Mr. Solicitor, that's the Government's position.

ASSISTANT SOLICITOR. That's the policy and the position taken by the Government in all these matters. For this reason, it is very difficult sometimes to prove actual intent within the mind of a respondent and the only way we can arrive at the question of intent would be what is obvious from his written representations made through the mails. We have had respondents come in here, Mr. Fast, who make the most untrue claims about some herb or something—I am not comparing your product—but they make the most outlandish claims for some foreign herb brought in

from Mexico or China or somewhere, and this man will represent here that he believed in that, that his grandma had told him all about it or something of the kind. And
 349 if they were permitted to make such a defense as that to the issuance of a fraud order we wouldn't have many fraud orders issue. And the Government has to take the advertising which constitutes the representations made through the mails and hold the respondent entirely responsible for them. Whether he intended to violate a law or not he is responsible for what he sends through the mails. Therefore, what would be the value of this testimony if it were in the record?

Mr. FAST. Well, I probably didn't make my position clear. When I say bona fides—I mean I don't presume that just because an individual thinks his product is good that in itself means that it is good. What I am trying to show is that as soon as we found out an error had been made it was stopped. Of course, the real reason why we stopped sending out 3-C—and incidentally that's the only circular of its kind that you will find in all your exhibits backing up Mr. Pinkus's statement in the original record that they weren't used any more—ought to be some proof that this man isn't just a fly-by-night, that he isn't a faker and that he has got something which apparently is backed up by medical opinion. Now, I still feel that your Honor ought to have all available testimony. I think that the Government may make much of this 3-C and I think in view of that your Honor ought to have all the testimony available with regard to that.

Assistant SOLICITOR. Well, let's take the situation.
 350 I am merely asking these things to give you an opportunity to express your views on what is going through my mind—

Mr. FAST. Yes, I can see.

Assistant SOLICITOR. —not definite conclusions I have reached but just for that purpose. Now, a purchase was made in the test correspondence, which is Government's Exhibit 3, and when we use the term "test correspondence" we mean the inquiries and the replies. Now, a purchase was made in that particular case by the inspector over an assumed name, a test name or whatever you want to call it—it is not a person in existence—on the strength of that circular. No doubt there were others who did the same thing during the period that they were used. Now, wouldn't the respondent therefore be responsible in that case?

Mr. FAST. He would.

Assistant SOLICITOR. That's not only to this particular party but no doubt to others who received the same circular.

Mr. FAST. Of course, it doesn't appear how many of such circulars were sent out and how many people were—

Assistant SOLICITOR. I well understand that the record is inadequate or incomplete in that respect that it doesn't show how many of those were sent out. Of course, if the inspectors, knowing their thoroughness as I do, if the inspectors had known that any such question would be raised they probably would have sent more inquiries in. But it can be presumed that a number of them were sent out over a certain period of time. And I am wondering if we

351 could ever relax the rule of the responsibility of the respondent for what he sends through the mails by permitting evidence to go in which might permit him to avoid or evade the responsibility for what he does send through the mails. In other words, when I'm sitting here I'm thinking of the policy of the Department in all matters and not what might apply to a particular case. Now, could we admit testimony of this kind?

Mr. FAST. I think you could. I think the courts generally recognize that we are not living in an age of perfection and that mistakes can be made. And apparently when this mistake was made, as would appear if these men were permitted to swear what happened in accordance with their affidavits, this Exhibit 3-C was no longer used and that, I think, would be very important testimony.

Mr. MANHERZ. Mr. Solicitor, may I make a further point?

Assistant SOLICITOR. Yes.

Mr. MANHERZ. This goes of course to the weight of the affidavit perhaps rather than to the admissibility of it, but I think it is pertinent, and that is that if the promoter of this enterprise felt after he received these advertisements similar to Government Exhibit 3-C from his printer he felt that they did not properly state his proposition to the purchasing public he should not have used them. If he did not discover the error until after they were used and then he discovered the error and wished to disavow any of the representations in there, I see no evidence nor has any been

352 offered in the affidavit to show that the promoter attempted to rectify the error with persons who had purchased on the previous representation by offering to refund their money or refusing orders which came to him as a result of such advertising matter. So, certainly

in view of that fact I don't think Mr. Pinkus comes in good faith now to say that the error is one of his printer and not of his own since he has benefited and continued to benefit by the error of his printer. I say that would be a nice subterfuge if a person desired to avoid say criminal responsibility for instance by raising the point that, well, this wasn't my representation my printer made the error but of course I accepted the remittances from it nor did I make any offer to refund to persons who remitted pursuant to such advertising matter. So on the basis of that, Mr. Solicitor, I state that this offer of an affidavit together with some circular matter concerning a transaction which occurred between the promoter and his printer is outside the record and does not relieve the promoter of responsibility for the operation of the enterprise as disclosed by the evidence already in the record.

Mr. FAST. Of course, we have a refund guarantee in all of our advertising but I am quite sure that if we had sent letters out to those people that we felt received 3-C and we came in here and said so you would probably feel that's conclusive evidence that we did something that was wrong.

353 Assistant SOLICITOR. Let me ask you two gentlemen this: What was Mr. Pinkus' testimony concerning 3-C, did he testify that the printer had made a mistake?

Mr. FAST. No, he didn't. As a matter of fact we didn't discover this until after we came back, but he did say that he stopped sending them out in the summer of '44. My recollection of that, I didn't bring all my file with me, was that the New York office of the Food and Drug Administration suggested not to send that kind of a circular out to the general public.

Assistant SOLICITOR. Did he give any testimony as to how long the circular was in use?

Mr. FAST. I think so.

Assistant SOLICITOR. When did he testify that he started his mail-order business?

Mr. FAST. I don't know that that's in his testimony. I don't think that is in the testimony. I don't think either of us asked him that.

-(Discussion off the record.)

Assistant SOLICITOR. I have made a number of statements into the record so that you gentlemen might understand fully my thoughts on the subject and that you might make reply to them. Inasmuch as the Government had made no objection to the form of the testimony which you offer,

that is, the testimony is in affidavit form, I am considering
 your motion just in the same manner as I would con-
 sider the testimony of the affiant if he were here to
 give testimony, and I don't believe that the testi-
 mony would be relevant to the issues on account of
 the fact that the respondent is responsible for everything
 he sends through the mails and is made so by law. And
 inasmuch as I would hold incompetent his testimony if
 given here in open court I will have to hold that the affi-
 davit is not admissible.

Mr. FAST. Would your Honor grant me an exception—
 Assistant SOLICITOR. Yes.

Mr. FAST. —and make this part of the record.

Assistant SOLICITOR. This will be a part of the record.
 (Whereupon, the hearing adjourned at 11:45 o'clock
 a. m. on February 1, 1945.)

355 Supreme Court of the United States

No., October Term, 1948.

LOUIS A. REILLY, as Postmaster of the City of Newark, etc.,

PETITIONER,

v.

JOSEPH J. PINKUS, trading as AMERICAN HEALTH AIDS
 COMPANY, etc.

*Order Extending Time to File Petition for Writ of
 Certiorari*

UPON CONSIDERATION of the application of counsel for
 petitioner,

IT IS ORDERED that the time for filing petition for writ of
 certiorari in the above-entitled cause be, and the same is
 hereby, extended to and including February 21, 1949.

HAROLD A. BURTON,
*Associate Justice of the Supreme
 Court of the United States.*

Dated this 17th-day of January, 1949.

Supreme Court of the United States

Order allowing certiorari

(Filed May 16, 1949)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 583

**LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF
NEWARK, IN THE COUNTY OF ESSEX AND STATE OF
NEW JERSEY, PETITIONER**

v.

**JOSEPH J. PINKUS, TRADING AS AMERICAN HEALTH
AIDS COMPANY, ALSO KNOWN AS ENERGY FOOD
CENTER**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on October 25, 1948.

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey (R. 46-51, 59-62) are reported at 61 F. Supp. 610 and 71 F. Supp. 993. The opinion of the United States Court of

Appeals for the Third Circuit (R. 68-74) is reported at 170 F. 2d 786.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1948 (R. 76). By order of the Court dated January 17, 1949, time within which to file this petition for certiorari was extended to and including February 21, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the Postmaster General lacked power to base findings, on which a fraud order was issued, on the testimony of expert medical witnesses.

STATUTE INVOLVED

R. S. 3929, as amended, 39 U. S. C. 259, provides in pertinent part:

The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof * * *.

R. S. 4041, as amended, 39 U. S. C. 732, provides in pertinent part:

The Postmaster General may, upon evidence satisfactory to him that any person or company * * * is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders.

STATEMENT

Respondent, sole owner of a business in Newark, New Jersey, conducted under the trade name of "American Health Aids Company," is engaged in selling through the mails an obesity treatment called "Dr. Phillips' Kelp-I-Dine Reducing Plan" (R. 14, 15).¹ The treatment is widely advertised in newspapers and magazines, and by means of radio broadcasting (R. 15, 19). In one form or another, all of these advertisements represent that respondent's obesity treatment provides a safe, quick, easy, and harmless method of losing from

¹ Kelp-I-Dine is a Pacific kelp or dried seaweed. Chemical analysis in evidence before the Postmaster General on the fraud order hearing showed that one-half teaspoonful of this kelp contains .4 milligram of iodine and small quantities of other minerals (R. 15).

3 to 5 pounds a week, without the use of exercise or drugs (R. 16-21, 28-35). The essence of the treatment offered is the taking of a half teaspoonful of Kelp-I-Dine with any meal, "preferably at breakfast" (R. 16, 17, 19, 20, 21). The various advertisements, in one striking form or another (R. 28-35), state that the treatment permits the purchaser to eat as he usually does, to eat plenty, and does not require cutting out fatty, starchy or rich foods, although the purchaser is advised to "cut down" on such foods (R. 16, 17, 18, 19, 22). The treatment is represented as a "scientific and guaranteed plan for reducing," approved by doctors (R. 19). Kelp-I-Dine is represented as a safe means of losing weight even if the purchaser suffer from diabetes, rheumatism "or any other ailment" (R. 19). Kelp-I-Dine is also represented as a means of satisfying "hidden hunger" in two ways: (1) By containing the minerals (including essential iodine) that satisfy such hidden hunger (R. 20); and (2) by adding bulk and giving a feeling of fullness (R. 21). The purchaser of respondent's treatment receives a 2 ounce container of Kelp-I-Dine and a "suggested menu for one day" entitled "Dr. Phillips' Kelp-I-Dine Reducing Plan."

A memorandum of charges dated November 23, 1944, was issued against respondent by the Post Office Department, directing him to show cause why a fraud order should not be issued (R. 14). This memorandum charged that the above-de-

scribed treatment for obesity constituted a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of 39 U. S. C. 259 and 732 (R. 14). The hearing on the show cause order was continued from December 15, 1944, until January 10, 1945 (R. 14).² The respondent appeared in person and was represented by counsel (R. 14).

The findings of fact, pursuant to which the fraud order here involved was issued, were based solely upon the medical testimony of the expert witnesses appearing on behalf of the Government and the respondent at this hearing (R. 25). Two doctors testified as expert medical witnesses for the Government, one, the senior medical officer of the Food and Drug Administration, the other a physician of Washington, D. C., who is also a professor of medicine at the Schools of Medicine at George Washington University and Georgetown University (R. 22). Respondent offered the testimony of a physician from Newark, New Jersey (R. 22).

The medical testimony is analyzed in the memorandum prepared by the Solicitor of the Post Office Department (R. 22-25). Briefly summarized, such

² Hearings were held on January 10, 11, and 13 and February 1, 1945. Plaintiff took advantage of the opportunity to present his witnesses and to cross-examine the Government's witnesses. The transcript of the proceedings before the Post Office Department, covering 354 pages, is printed in a separate volume as part of the record herein (R. II 3-227). Reference to the second volume of the record will be made to R. II.

testimony showed that kelp was valueless in the treatment of obesity, and that any loss of weight resulting from "Dr. Phillips' Kelp-I-Dine Reducing Plan" was caused by the severe restriction on daily caloric intake prescribed by respondent's plan in his suggested daily diet (R. 23).

As to the kelp itself, the evidence established that its only value was in supplying a possible "nutritional supplement for increasing daily intake of iodine from ocean vegetation,"³ and that the sole purpose of such an intake would be to prevent iodine deficiency diseases, a precaution necessary only in certain limited areas of the country (R. 23).⁴ Respondent's medical expert admitted that his testimony with regard to the effectiveness of Kelp-I-Dine and the Dr. Phillips' plan was based on the report of another doctor which did not express his own opinion upon the subject (R. 23). His own test of Kelp-I-Dine was limited to putting some in his mouth and swallowing it with water (R. 23). Although testifying that kelp was an "anti-fat for reducing," he admitted that he had never prescribed it for such purpose and knew of no doctor who had (R. 23). He further admitted

³ Respondent claimed no more than this as to the nature of kelp on the label which, under the approval of the Food and Drug Administration, was placed on packages of Kelp-I-Dine (R. 22, 23).

⁴ Medical testimony clearly showed that iodine or other mineral deficiency diseases do not produce obesity, and that sufferers from such diseases may be underweight or overweight (R. 24).

that he had never heard of anyone who had reduced while taking kelp (R. 24). To the extent that salts of iodine were used in the treatment of obesity, he stated that the ordinary dosage would be "one gram three times a day" (R. 23). The daily intake of iodine from the Kelp-I-Dine prescribed by respondent would be .4 milligram, a milligram being one-thousandth of a gram (R. 23).

As noted above, the evidence clearly established that any loss of weight resulting from respondent's treatment was caused by the diet plan which he prescribed. The medical testimony showed that the average American sustaining diet contains in excess of 2,000 calories a day and that the diet of the obese ordinarily contains a considerably greater caloric intake (R. 23). All of the medical testimony was to the effect that obesity is ordinarily caused by overeating, although in some cases there may be other contributing conditions (R. 24). The daily diet prescribed by respondent provides about 1,000 calories per day (R. 23). Both the Government's witnesses and respondent's expert agreed that the diet so prescribed was severe and the Government's witnesses further testified that a person following such a rigid diet would experience the discomforts and strain of hunger, particularly if accustomed to overeating (R. 23-24). The testimony established that reduction in weight which would be caused by respondent's diet would vary in extent in various patients; that the diet might

effect the loss of three pounds per week but would not ordinarily do so (R. 24). The Government's experts further testified that the taking of a daily dose of one-half teaspoonful of kelp would not reduce such hunger in any way, either by adding bulk or by any other effect (R. 23, 24). All three medical witnesses agreed that treatment for obesity should be individualized and be prescribed only after diagnosis (R. 24). The testimony showed that the loss of as much as three pounds a week on a restricted diet might well be harmful; further, that a severe diet, such as that prescribed by respondent, might even produce serious results in patients with chronic diseases, particularly of the heart and kidneys (R. 24).

Viewing the obesity treatment which respondent held out in the light of the above testimony, the Post Office Department concluded that a purchaser of respondent's treatment was led to believe that Kelp-I-Dine was a valuable product for the treatment of obesity, and was not given notice that he was merely purchasing a recommended diet considered rigid and severe. On the testimony it was found that none of the other representations made by respondent could be sustained: The purchaser would not be able to "eat plenty" or as he usually did; would not be able to reduce to the extent promised by respondent even if he followed the severe diet, which might be harmful if not scientifically indicated in his particular case; and that,

in any event, he would experience hunger, discomfort and strain inasmuch as the testimony established that kelp is valueless for the purpose offered, containing nothing that would prevent or satisfy the hunger incident to following a rigid diet (R. 24-25). A finding was accordingly made that respondent was engaged in conducting a scheme for obtaining money through the mails by means of fraudulent representations and promises, in violation of 39 U. S. C. 259 and 732, as averred in the memorandum of charges (R. 26). A fraud order was issued on May 7, 1945 (R. 12-13).⁵

Respondent instituted this litigation on June 1, 1945, by the filing of a complaint seeking to enjoin the Postmaster General and the Postmaster of the City of Newark from enforcing the fraud order (R. 3-11). Simultaneously, respondent obtained an order to show cause, returnable June 11, 1945, why an order should not be entered enjoining the named defendants from enforcing the fraud order (R. 43). On June 11, 1945, a hearing was held on the order to show cause, and on motions to quash service and to dismiss as to the Postmaster General and the Postmaster of Newark (R. 1, 44, 45). The district judge rendered his opinion on July 18, 1945 (R. 46). He first disposed of questions raised as to indispensable parties, grant-

⁵ During the course of this litigation, the fraud order was limited by the Postmaster General so as to be applicable only to the American Health Aids Company, and its officers and agents as such, at Newark, New Jersey (R. 70).

ing the motion to quash service as to the Postmaster General but denying the motion to dismiss as to the Postmaster (R. 46-49). Passing to the merits, he ordered a permanent injunction against the Postmaster forbidding him to carry into effect the fraud order issued by the Postmaster General (R. 51).⁶ At the time of this holding that respondent was entitled to permanent injunctive relief, the district judge had before him only the complaint (R. 3-12) and three exhibits, consisting of the fraud order itself and the Solicitor's memorandum (R. 12-26), a copy of a "Typical Suggested Kelp-I-Dine Diet" (R. 26-27), and excerpts from some medical dictionaries (R. 36-42). No answer had then been filed nor was any copy of the transcript of the proceedings before the Postmaster General outside of Washington, D. C. The district judge nevertheless held that a " * * * careful examination of the Solicitor's memorandum and of all the evidence adduced at the hearing * * *" led to the conclusion that there was insufficient evidence from which the Postmaster General could have found " * * * actual fraud in fact on the part of the plaintiff * * *" (R. 50). This review of the evidence, he stated, " * * * showed a divergence of opinion as to the effectiveness of the Kelpidine reducing plan and of the

⁶ The permanent injunction thus ordered was later modified to a preliminary injunction pending the further order of the district court (R. 59, 51-54).

inherent values of kelp as employed therein * * *," citing *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (R. 50). Again referring to the *Magnetic Healing* case, the district judge stated his view that the remedy whereby harmful advertising should be reached lies in "* * * other fields than those governed by postal regulations * * *," and can be better solved "* * * by supervising agencies within the actual scope of medical control and by export [sic] regulation, than by more or less arbitrary prohibition by the Post Office Department" (R. 50-51).

On October 2, 1945, an answer was filed, the transcript of the proceedings before the Post Office Department being made a part thereof (R. 54-57). Thereafter, a motion for summary judgment was made on behalf of the Postmaster (R. 58). By opinion dated June 5, 1947, this motion was denied (R. 59-62). The district judge held that "further examination" of all the evidence led him to the same conclusion as that originally reached at the hearing on the motion for a preliminary injunction (R. 60). Again referring to the *Magnetic Healing* case, the district judge held an injunction warranted on the ground that the fraud order had been issued in a case "* * * not within his jurisdiction * * *" (R. 60). The court held that this lack of power necessarily followed from the fact that the findings underlying the fraud order were "based only upon the medi-

cal testimony of the expert witnesses" (R. 61), and that such findings as to the " * * * effectiveness of the plan, the severity of the diet, and the inherent values of kelp as employed in the kelpidine plan, are not such matters * * * as are subject of proof as an ordinary fact * * * " (R. 61).

Subsequent to this opinion, a motion for summary judgment made by respondent was granted (R. 62-64). On appeal, the judgment of the district court was affirmed on October 25, 1948 (R. 76), one judge dissenting (R. 74-76).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the issuance of the fraud order was based on substantial evidence.

2. In holding that the Postmaster General lacked power to base findings, in support of a fraud order, on the testimony of medical expert witnesses.

3. In failing to reverse the district court judgment and order the proceeding dismissed.

REASONS FOR GRANTING THE WRIT

1. The court below conceded that court review of the issuance of a fraud order " * * * extends no further than to determine whether there is substantial factual evidence to support the Postmaster General's conclusion * * * " (R. 73), but thought

that under *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, the issuance of such an order could not be based upon the opinion evidence of medical expert witnesses, at least where there was a conflict of opinion, but only upon factual proof as to the value of a product—by which apparently was meant specific scientific tests and experiments conducted by the witness. But *Leach v. Carlile*, 258 U. S. 138, indicates that the *Magnetic Healing* case cannot be regarded as standing for any such broad proposition. In any event, there was no real conflict of opinion as to material matters in the instant case.

The court limited *Leach v. Carlile* by confining it to cases where the alleged medical fraud consisted of a claim, by advertising or otherwise, that the product or scheme offered for sale constituted a “* * * panacea or cure-all article * * *” (R. 72). Since the fraud here charged consisted of a scheme of specific deception, the court thought the *Magnetic Healing* case, not *Leach v. Carlile*, controlling (R. 71-72).⁷

⁷ The court does not indicate the basis for the sharp distinction thus drawn between the legal vulnerability of a fraudulent scheme to sell a panacea and a fraudulent scheme to sell a specific medicine or cure. Moreover, the distinction clearly misapprehends the meaning to be attached to “panacea” as that word was used in the Court’s opinion in *Leach v. Carlile*. “Panacea” refers to any scheme which exaggerates the efficacy of a product beyond the range of permissible difference of opinion, rather than to a cure-all. So understood, the term readily characterizes the nature of respondent’s claim herein.

We submit that the analysis by the court below of the *Magnetic Healing* case and *Leach v. Carlile*, and its limitation of the rule as to judicial review in fraud order cases, are plainly erroneous. To the extent that the *Magnetic Healing* case states a special rule of review for cases involving the vending of medical schemes and cures, it should be confined to areas of medical knowledge where the decision of the issue presented rests on considerations too problematical and controversial to be considered as proof of any sort. This is not such a case. The decision is entirely inapplicable where, as here, the expert testimony is based on scientific facts and knowledge which have become generally accepted through the advance of medical science. In the latter type of case, judicial sanction should not be given to an interpretation of the *Magnetic Healing* doctrine contended for by all defendants in proceedings to reach fraudulent merchandising of medicines and cures, namely, that the doctrine requires the automatic elimination from consideration of all medical opinion testimony.

Leach v. Carlile, setting forth the usual rule of review, should control the disposition of this case. Purchasers of respondent's obesity treatment were led to believe that they could achieve drastic reductions in weight by taking a half teaspoonful of Kelp-I-Dine with meals, "preferably at breakfast," and that no discomfort or danger was in-

volved in the plan. The evidence established that, in fact, the Kelp-I-Dine so prescribed was valueless for reducing purposes and that any reduction in weight which followed the purchase of respondent's plan was achieved by an extremely rigorous restriction of daily caloric intake, a restriction to the point of danger in purchasers with chronic diseases, particularly of the heart and kidneys. There was, in fact, no substantial disagreement among the medical expert witnesses on the important points involved at the hearing. The medical witness offered by respondent agreed with the Government's witnesses that obesity is ordinarily caused by overeating, although in some cases there may be other contributing conditions; that the diet prescribed by respondent's plan was severe; and that treatment for obesity should be individualized and prescribed only after diagnosis (R. 24). He admitted that his testimony with regard to the effectiveness of Kelp-I-Dine and the obesity plan did not express his own opinion but was based on the report of another doctor; that his own test of Kelp-I-Dine was limited to putting some in his mouth and swallowing it with water; that he had never prescribed Kelp-I-Dine for reducing and knew of no doctor who had; that he had never heard of anyone who had reduced while taking kelp; and that, to the extent iodine salts were used in the treatment of obesity, a prescription would be one gram three times a day whereas the daily intake of iodine

from Kelp-I-Dine as prescribed by respondent was .4 milligram, a milligram being one-thousandth of a gram (R. 23).⁸

There is no scope for a proper application of the *Magnetic Healing* case herein. Certainly, the mere availability to the defense on a charge of medical fraud of a cooperative medical witness cannot, in and of itself, suffice to invoke the automatic bar of the *Magnetic Healing* case and thereby block action necessary for consumer protection. Similar contentions have been vigorously rejected by courts in dealing with the same problem of review. *Todd v. F.T.C.*, 145 F. 2d 858 (C.A. D.C.); *Neff v. F.T.C.*, 117 F. 2d 495, 497 (C.A. 4); *Irwin v. F.T.C.*, 143 F. 2d 316, 323-324 (C.A. 8); *John J. Fulton Co. v. F.T.C.*, 130 F. 2d 85, 86 (C.A. 9), certiorari denied,

⁸ Respondent's medical witness had testified, on direct examination, that iodine in the system reduced weight by increasing metabolism and that Kelp-I-Dine would cause some weight reduction on account of its iodine content (R. II 174, 176). He admitted, on cross-examination, that he did not know the quantity of the ingredients in Kelp-I-Dine except that it contained a very small amount of iodine (R. II 185, 186, 189-193), which he stated to be .3 milligram. He further stated that the daily dose prescribed would consist of an iodine salt in the amount of 1 gram three times a day (R. II 192), a dosage "50 or 60 times" larger than that contained in the daily prescription of Kelp-I-Dine and in a different form, the Kelp-I-Dine containing not an iodine salt but direct or metallic iodine (R. II 192). Since, as indicated above, a milligram is one-thousandth of a gram, the disparity between the amount of metallic iodine contained in the daily dose of Kelp-I-Dine and three grams a day of an iodine salt is far greater than the difference indicated by this witness. He further stated that he had never given iodine to increase metabolism (R. II 197) and that he did not know how much Kelp-I-Dine in the prescribed dosage would increase metabolism, if at all (R. II 204, 207-208).

317 U.S. 679; *Justin Haynes & Co. v. F.T.C.*, 105 F. 2d 988, 989 (C.A. 2), certiorari denied, 308 U.S. 616; *United States v. Seven Jugs of Dr. Salisbury's Rakos*, 53 F. Supp. 746, 759 (D. Minn.)

Here, there is no need to disparage the qualifications or sincerity of the medical witness offered by the respondent at the Post Office Department hearing. That proceeding, in fact, brought to light no honest differences of opinion, no controversial schools of thought or any of the other indicia of lack of knowledge which might provide an occasion for the use of the doctrine of the *Magnetic Healing* case. On the contrary, the fraud order here involved was plainly supported by substantial evidence. The witnesses here agreed on the causes of obesity, the need for individualized treatment, the severity and danger of the diet involved and the lack of value of Kelp-I-Dine as a reducing factor. It is only by the total exclusion of medical expert testimony, without regard to the fact that such testimony in this case is based on established and universally accepted fact, that the result below was reached. The court below characterized all such evidence as "opinion evidence" solely for the purpose of invoking its rule of exclusion. We submit that this use of the *Magnetic Healing* case is improper. And there is no merit to the suggestion below that a different result might have been attained if the witnesses here involved had gone into a laboratory and performed specific experiments for the purpose of

the Post Office Department hearing. There would seem to be no purpose served in any case by performing such experiments to establish facts already generally accepted and not substantially controverted.⁹

2. The question is one of broad importance to all cases involving medical frauds. The substantial evidence rule, as the test of court review of the issuance of fraud orders, is also the rule governing review of cease and desist orders issued by the Federal Trade Commission. Similarly, the same question as to the validity of expert medical testimony comes up in proceedings brought by the Pure Food and Drug Administration. Both of these Departments, as well as the Post Office Department, have indicated to this Department their grave concern with the decision of the court below and have requested that review by this Court be sought.¹⁰

3. The lower courts have almost uniformly not regarded the *Magnetic Healing* decision as controlling in cases of this sort. The ruling below as

⁹ A chemical analysis of Kelp-I-Dine was, of course, made and placed in evidence before the Postmaster General on the fraud order herein (R. 15).

¹⁰ It should be noted that the decision below has been utilized in pending New Jersey cases as the basis for enjoining the enforcement of fraud orders. *Simon Bloom and Jeanette Bloom, Trading as World Wide Vitamin Company v. Reilly*, D. N.J., Civil Action No. 9143, decided January 14, 1949; *Pinkus, Trading as Spot Reducer Co. v. Reilly*, D. N.J., No. 11035, October 27, 1948; *Scientific Aids Company v. Kern*, D. N.J., Civil No. 11484, October 28, 1948.

to the worth of the type of evidence here involved is in conflict with the following decisions, in which findings based on medical opinion testimony were upheld despite the presence of conflicting testimony: *Justin Haynes & Co. v. F.T.C.*, 105 F. 2d 988, 989 (C.A. 2), certiorari denied, 308 U. S. 616; *Neff v. F.T.C.*, 117 F. 2d 495 (C.A. 4); *Aronberg v. F.T.C.*, 132 F. 2d 165, 169 (C.A. 7); *Dr. W. B. Caldwell v. F.T.C.*, 111 F. 2d 889, 891 (C.A. 7); *Irwin v. F.T.C.*, 143 F. 2d 316, 324 (C.A. 8); *John J. Fulton Co. v. F.T.C.*, 130 F. 2d 85, 86 (C.A. 9), certiorari denied, 317 U. S. 679; *Alberty v. F.T.C.*, 118 F. 2d 669, 670 (C.A. 9), certiorari denied, 314 U. S. 630; *J. E. Todd v. F.T.C.*, 145 F. 2d 858 (C.A. D. C.); *United States v. One Device*, 160 F. 2d 194, 198-199 (C.A. 10); *United States v. 7 Jugs of Dr. Salsbury's Rakos*, 53 F. Supp. 746, 757 (D. Minn.); cf. *Charles of the Ritz Dist. Corp. v. F.T.C.*, 143 F. 2d 676, 678-679 (C.A. 2); *Goodwin v. United States*, 2 F. 2d 200, 201 (C.A. 6); *Research Laboratories v. United States*, 167 F. 2d 410 (C.A. 9), certiorari denied, No. 134, this Term; *Seven Cases of Eckman's Alterative v. United States*, 239 U. S. 510, 518; *Cable v. Walker*, 152 F. 2d 23 (C.A. D. C.), certiorari denied, 328 U. S. 860; *Summers v. McCoy*, 163 F. 2d 1021 (C.A. 6), certiorari denied, 333 U. S. 855.¹¹

¹¹ See generally, *Warner's Renowned Remedies Co. v. F.T.C.*, 140 F. 2d 18 (C.A. D.C.), certiorari denied, 322 U. S. 754; *Associated Laboratories v. F.T.C.*, 150 F. 2d 629 (C.A. 2); *E. Griffiths Hughes v. F.T.C.*, 77 F. 2d 886, 887 (C.A. 2), certiorari denied, 296 U. S. 617.

CONCLUSION

For the reasons set forth above, the Solicitor General prays that a writ of certiorari issue to review the judgment of the court below herein.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 31

LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF
NEWARK, IN THE COUNTY OF ESSEX AND STATE
OF NEW JERSEY, PETITIONER

v.

JOSEPH J. PINKUS, TRADING AS AMERICAN HEALTH
AIDS COMPANY, ALSO KNOWN AS ENERGY FOOD
CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey (R. 46-51, 59-62) are reported at 61 F. Supp. 610 and 71 F. Supp. 993. The opinion of the United States Court of Appeals for the Third Circuit (R. 68-74) is reported at 170 F. 2d 786.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1948 (R. 76). By order

of the Court dated January 17, 1949, time within which to file a petition for certiorari was extended to and including February 21, 1949. (R. II, 227.)¹ The petition for a writ of certiorari was filed on February 21, 1949, and was granted May 16, 1949 (R. II, 228). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the fraud order issued by the Postmaster General is supported by substantial evidence.

2. Whether the Postmaster General lacked power to issue a fraud order where the findings which supported the order were based on the opinion testimony of expert medical witnesses.

3. Whether such power is lacking if the testimony of the experts is in conflict.

4. Whether the findings in this case are adequately supported apart from any conflict in evidence.

STATUTE INVOLVED

R. S. 3929, as amended, 39 U. S. C. 259, provides in pertinent part:

The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining

¹ The record in this proceeding is printed in two volumes. All references are to Volume I except where a Roman numeral II appears after R. to indicate that the second volume is intended.

money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof * * *.

R. S. 4041, as amended, 39 U. S. C. 732, provides in pertinent part:

The Postmaster General may, upon evidence satisfactory to him that any person or company * * * is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders.

STATEMENT

Respondent is the sole owner of a business in Newark, New Jersey, conducted under the trade name of "American Health Aids Company." (R. 14; II, 159.) On November 23, 1944, this concern which was doing an extensive business through the mails, receiving an average of 365 letters

daily (R. II, 8), was charged by the Solicitor of the Post Office Department with using the mails to defraud in connection with the sale of an obesity treatment called "Dr. Phillips' Kelp-I-Dine Reducing Plan" (R. 14, 15).²

At the hearing held on these charges the Post Office Department introduced in evidence the advertisements of the "Kelp-I-Dine Reducing

² The memorandum of charges read in detail (R. 14-15) :

"Said concerns and persons are obtaining and attempting to obtain various remittances of money through the mails from divers persons in payment for a product known as 'Kelp-I-Dine' and a treatment known as 'Dr. Phillip's Kelp-I-Dine Reducing Plan' for the reduction of excess fat, upon pretenses, representations, and promises contained in written and printed matter sent through the mails to the effect:

"That any person, regardless of age, sex or condition of health, who follows the Kelp-I-Dine Reducing Plan will reduce fat and regain a "shapely figure" easily, quickly, naturally, surely, and without discomfort, exercise, or restriction to any special dietary regimen;

"That any person following Dr. Phillip's Kelp-I-Dine Reducing Plan will lose 3 to 5 pounds per week and at the same time 'eat plenty' food without the necessity of cutting out bread, potatoes, gravy, ice cream, cake, candy, beer, or anything else, regardless of its caloric content;

"That any person following Kelp-I-Dine Plan as directed will lose weight quickly, easily, safely, and regain a shapely figure without experiencing hunger:

"That Kelp-I-Dine contains minerals (including essential iodine) that satisfy hidden hunger, false hunger that makes people overeat and add weight;

"That all doctors approve of the use of Kelp-I-Dine Reducing Plan in every case regardless of the age, sex, or condition of the user;

"Whereas, in truth and in fact, all of the aforesaid pretenses, representations and promises are false and fraudulent."

Plan," carried in national magazines and over the radio (R. II, 14-17, 29-35); various correspondence showing the use made of the mails in the sale of Kelp-I-Dine (R. II, 17-29); the material actually sent purchasers of the "Kelp-I-Dine Plan"—a two-ounce container of Kelp-I-Dine and a proposed diet; a chemical analysis of Kelp-I-Dine (R. II, 36); and the testimony of two expert witnesses—one the chief medical officer in the Department of Medicine at Gallinger Municipal Hospital who was also a professor of medicine at the Schools of Medicine of Georgetown University and George Washington University (R. II, 39-85), the other the Senior Medical Officer of the Food and Drug Administration (R. II, 86-124)—both of whom were familiar with the treatment of obesity. The respondent testified on his own behalf (R. II, 125-162) and also called as an expert witness a practicing physician from Newark, New Jersey (R. II, 169-215).

This evidence showed that respondent's obesity treatment is represented as a safe, quick, easy, and harmless method of losing weight without the use of exercise or drugs or restriction to any special dietary regimen. Advertisement of the treatment promised in bold type "Lose 3 to 5 Pounds a Week * * * Yet EAT PLENTY" (R. 16-21, 28-35). A representative advertisement reads in part (R. 17),

Follow the ~~Kelp-I-Dine~~ Reducing Plan.

Simply take a half teaspoonful of Kelp-I-Dine with any meal (preferably at breakfast). Eat As You Usually Do. Don't cut Out fatty, starchy foods, just Cut Down on them. That's all there is to it!

The plan was advertised as permitting "you to eat such things as ice cream, cake, candy, beer and all the other things you like. Remember with the Kelpidine Plan, you don't cut out ice cream, cake, candy, or any other things you like to eat. You just cut down on them." (R. 19.) The advertising also stated "you won't feel hungry while you take off pounds and inches" (R. 18). Elsewhere Kelp-I-Dine is represented as satisfying hidden hunger and decreasing appetite (R. 20, 21), and the treatment is asserted to be a safe means of losing weight, even though the purchaser suffer from diabetes, rheumatism or "any other ailment" (R. 19).

The purchaser who is induced by these glowing promises to send a dollar for the "Kelp-I-Dine Reducing Plan" receives a two-ounce container of Kelp-I-Dine, a Pacific Kelp or dried seaweed, and a "suggested menu for one day" called "Dr. Phillips' Kelp-I-Dine Reducing Plan".^{*} The

^{*} Attached to the complaint in this proceeding, as "Schedule B", and identified there as "Dr. Phillip's Kelp-I-Dine Reducing Plan" is a copy of this Plan (R. 26-27). The suggested diet is:

Breakfast

½ grapefruit, medium

suggested diet does not contain any of the fattening foods referred to above. (R. II, 20-21.) As the chemical analysis showed and was conceded by respondent, one-half teaspoonful of this kelp, the daily dose prescribed, contains no more than .4 milligram of iodine and small quantities of other minerals (R. II, 36, 189).

The medical testimony introduced by the Post Office Department showed that kelp was valueless in the treatment of obesity, and that any loss of weight resulting from "Dr. Phillips'

1 boiled, poached or shirred egg
1 slice thinly buttered bread
Coffee, with 3 tablespoons skimmed milk
 $\frac{1}{2}$ teaspoonful Kelp-I-Dine

Lunch

2 crackers
Egg salad, 2 hard-cooked eggs, sliced tomato, green pepper, celery, escarole, watercress and lettuce
Jello, if desired-

Dinner

Any consomme or clear soup
Broiled cod fish or other lean fish
Steamed cauliflower, use $\frac{1}{2}$ small head with 1 tomato, 1 helping
Steamed rice, $\frac{1}{4}$ cup
Relish, lettuce and sliced cucumber, with dressing, 2 tablespoons
Fresh fruit salad, diced banana, 1 plum, $\frac{1}{2}$ tangerine, 1 helping
Coffee or tea with 3 tablespoons skimmed milk.

Another diet, a little more liberal in its content, was apparently also sent purchasers of respondents Plan (R. II, 20-21, 91). The difference between the two was slight, however. Both provided between 800 and 1,200 calories a day (R. II, 91). In the subsequent discussion both are referred to simply as respondents' "diet" or "Plan".

Kelp-I-Dine Reducing Plan" was caused by the severe restriction on daily caloric intake prescribed by respondent's plan in his suggested daily diet. The Government's experts testified that the average American sustaining diet contains in excess of 2,000 calories a day and that the diet of the obese ordinarily contains a considerably greater caloric intake. (R. II, 55.) Obesity is ordinarily caused by overeating, although in some cases there may be other contributing conditions (R. II, 41, 202). The daily diet prescribed by respondent provides about 1,000 calories per day (R. II, 91). A person following such a rigid diet particularly if accustomed to overeating would experience discomfort from hunger which would in no way be assuaged by one-half teaspoonful of kelp daily (R. II, 44-48, 60, 89). The only possible value of kelp lies in supplying a possible "nutritional supplement for increasing daily intake of iodine from ocean vegetation" (R. 21-22),⁴ to prevent iodine deficiency diseases, a precaution necessary only in certain limited areas of the country (R. II, 87-88). Such diseases have no connection with obesity and sufferers from them may be either underweight or overweight (R. II, 94). Although the diet prescribed by respondent was severe, it

⁴ Respondent claimed no more than this as to the nature of Kelp on the label which, under the approval of the Food and Drug Administration, was placed on packages of Kelp-I-Dine (R. II, 147-150).

would neither necessarily, nor ordinarily, result in a loss of from three to five pounds of weight a week, since losses of that magnitude require near starvation (R. II, 91). The Government's experts further testified that a loss of from three pounds to five pounds a week is inadvisable and might be harmful even to those in good health (R. II, 70-71, 91-92, 119); further, that a severe diet, such as that prescribed by respondent, would be dangerous to patients with certain chronic diseases, such as that of the heart and kidneys (R. II, 54, 75). For these reasons treatment of obesity should be individualized and prescribed only after diagnosis (R. II, 72, 78, 91-92). While both the Government's experts admitted that they had not actually tested Kelp-I-Dine on patients, both stated themselves to be thoroughly familiar with the treatment of obesity and with the effect of iodine on the system (R. II, 40-41, 86-87, 121). Iodine, one of them testified, had been elaborately tested (R. II, 102, 116) and he had employed it himself in practice (R. II, 122). Their testimony, they stated, was in accord with the consensus of medical opinion (R. II, 60, 97). One witness conceded that at one time kelp had been believed to have properties making it useful as a diet aid, but added that this belief was no longer entertained by any medical authorities (R. II, 103, 105).

Much of the testimony given by the Government's two witnesses was corroborated by the

medical expert called by defendant. He agreed that a diet such as respondent's might prove harmful to persons suffering from tuberculosis, anemia, or diseases of the heart. (R. II, 184.) He also agreed that neither mineral deficiency diseases nor an increased daily intake of minerals have any effect upon obesity (R. II, 200, 202). While he testified at one point that Kelp-I-Dine would satisfy hidden hunger (R. II, 178), he stated at another that it would increase the appetite by working on the metabolic process (R. II, 203, 211). Although he asserted that kelp was an "anti-fat for reducing" (R. II, 169), he admitted that he knew of no doctor who had prescribed it for such purpose (R. II, 174), nor had he ever heard of anyone who had reduced while taking Kelp-I-Dine (R. II, 181). His belief that Kelp-I-Dine would facilitate the loss of weight was based on its iodine content (R. II, 176). Although he had never prescribed iodine for the treatment of obesity he was of the opinion that iodine, by increasing metabolism, might affect overweight (R. II, 174-175, 197). However, he admitted that the recommended dosage of iodine was 50 to 60 times greater than that contained in a half teaspoonful of Kelp-I-Dine to have such effect (R. II, 192). To the extent that salts of iodine were used in the treatment of obesity the ordinary dosage would be "one gram three times a day" (R. II, 192); the iodine in a half teaspoonful of Kelp-I-Dine is one-third

of a thousandth of a gram (R. II, 185). Further, iodine appeared in Kelp-I-Dine in its metallic form in which it was never prescribed (R. II, 186, 188). Finally he conceded that even were the dose effective it would take weeks before any change appeared in the basal metabolism (R. II, 200). Although he testified that the "Kelp-I-Dine Plan", would produce a loss in weight of from three to five pounds a week (R. II, 170) he admitted on a cross-examination that he based this conclusion entirely on a report of another doctor (R. II, 207, 212) and personally had no idea what diet would be necessary to produce a loss of weight in that amount (R. II, 201). His own test of Kelp-I-Dine was limited to putting some in his mouth and swallowing it with water (R. II, 190).

Viewing the obesity treatment which respondent held out in the light of the above testimony, the Post Office Department concluded that a purchaser of respondent's treatment was led to believe that Kelp-I-Dine was a valuable product for the treatment of obesity, and was not given notice that he was merely purchasing a recommended diet considered rigid and severe. On the basis of this evidence it was found that none of the representations made by respondent could be sustained: the purchaser would not be able to "eat plenty" or as he usually did; would not be able to reduce to the extent promised by respondent even if he followed the severe diet, which

might be harmful if not scientifically indicated in his particular case; and that, in any event, he would experience hunger, discomfort and strain inasmuch as the testimony established that kelp is valueless for the purpose offered, containing nothing that would prevent or satisfy the hunger incident to following a rigid diet. (R. 24-25.)

Accordingly, respondent was found to be engaged in conducting a scheme for obtaining money through the mails by means of fraudulent representations and promises as averred in the memorandum of charges (R. 26) and a fraud order was issued on May 7, 1945 (R. 12-13).⁵

Enforcement of this fraud order was permanently enjoined, however, on July 18, 1945, by the United States District Court for the District of New Jersey⁶ (R. 51-54). Although the district judge had before him at the time only the complaint (R. 3-12) and three exhibits, consisting of the fraud order itself and the Solicitor's memorandum (R. 12-26), a copy of a "Typical Suggested Kelp-I-Dine Diet" (R. 26-27), and excerpts from some medical dictionaries (R. 36-42), he nevertheless held that a " * * * care-

⁵ During the course of this litigation, the fraud order was limited by the Postmaster General so as to be applicable to only the American Health Aids Company, and its officers and agents as such, at Newark, New Jersey (R. 70).

⁶ The permanent injunction thus ordered was later modified to a preliminary injunction pending the further order of the district court (R. 59, 51-54).

ful examination of the Solicitor's memorandum and of all the evidence adduced at the hearing * * * led to the conclusion that there was insufficient evidence from which the Postmaster General could have found " * * actual fraud in fact on the part of the plaintiff * * " (R. 50). This review of the evidence, he stated, " * * showed a divergence of opinion as to the effectiveness of the Kelpidine reducing plan and of the inherent values of kelp as employed therein * * ", which was insufficient to support a finding of fraud in fact, citing *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (R. 50).

Subsequently, on June 5, 1947, after an answer had been filed incorporating the administrative record, the court decided defendant's motion for summary judgment (R. 59-62). "Further examination" of the evidence, the court said, led to the same conclusion as that originally reached. Again referring to the *McAnnulty* case, the district judge held an injunction warranted on the ground that the fraud order had been issued by the Postmaster General in a case " * * not within his jurisdiction * * " (R. 60). The court is convinced, the opinion states, that the questions involved are not "the kind of question intended to be submitted for decision to a Postmaster General. The effectiveness of almost any particular method of treatment of disease is to

a greater or less extent a fruitful source of difference of opinion. The effectiveness of the treatment under plaintiff's plan, the inherent value of kelp as a reducing agent in connection with the dietary regimen, and the severity of the diet suggested are of this character, and the efficacy of any particular method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud." (R. 61.)

Subsequent to this opinion, a motion for summary judgment made by respondent was granted (R. 62-64). On appeal, the judgment of the district court was affirmed on October 25, 1948 (R. 76), one judge dissenting (R. 74-76). The majority of the court, although disagreeing with the court below that the value of the product and plan involved could not be factually proven, stated that it was "constrained to affirm the judgment of the court below upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General."

SPECIFICATION OF ERRORS TO BE URGED

1. In failing to hold that the issuance of the fraud order was based on substantial evidence.
2. In holding that the Postmaster General lacked power to base findings, in support of a fraud order, on the testimony of medical expert opinion witnesses.

3. In holding that the Postmaster General lacked power to base findings, in support of a fraud order, on the testimony of medical expert opinion witnesses, if the testimony of such witnesses was in conflict.

4. In failing to reverse the district court judgment and order the proceeding dismissed.

SUMMARY OF ARGUMENT

I

The fraud order is fully supported by more than substantial evidence, and this is sufficient to require affirmance of the Postmaster General's findings. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, upon which the lower courts relied, does not justify disregarding the evidence of the Government's expert witnesses.

II

A. The *McAnnulty* case was concerned with an undenied allegation that a mind healing remedy was not misrepresented; the court assumed that the subject was one as to which the efficacy of the remedy was not susceptible of proof or disproof as a fact, and as to which there could be only conflicting schools of opinion. This Court and the lower courts have repeatedly held that the case does not prevent the use of expert medical opinion testimony, even when conflicting, as to the value of a remedy. *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 646, which

involved another cure for obesity as to which there was conflicting medical testimony, is directly in point.

B. 1. If read as excluding from consideration all expert medical opinion testimony, the decision below is inconsistent with established principles of evidence. Since tests of products which might be harmful are often impossible, and expert opinion testimony is often the only feasible method of proof, the disqualification of such evidence would make it impossible to protect the public against fraudulent nostrums. The *McAnnulty* case is limited to matters of opinion which cannot be disproved in fact. It does not preclude the use of what may be called "opinion evidence" to prove that misrepresentations of fact are untrue. Statements that a particular product will cause a reduction in weight without hunger fall in the latter category.

2. Even if the opinion below is read as disqualifying expert testimony only when there is a conflict in medical opinion, it is equally indefensible. The introduction of conflicting evidence affects the weight, not the competence or admissibility of the testimony of the Government's witnesses. Since there are few remedies so worthless that someone cannot be found to swear to their virtues, there would be little difference in practice between such a conditional bar and the complete exclusion of expert testimony. At most,

the *McAnnulty* case indicates that the fraud order statute was not designed to permit the Postmaster General to resolve differences of opinion between two schools of medical thought as to matters not susceptible of factual proof. Certainly the mere availability to the defendants on a charge of medical fraud of a co-operative medical witness cannot in and of itself suffice to immunize their conduct.

III

In any event, there is no conflict in medical opinion as to the basic propositions which prove respondents' fraud. Respondents' medical expert admitted that the amount of iodine in the usual dosage for obesity was vastly greater than the minute quantity contained in kelp, that he had never used such a small amount or known of its prescription by any medical authority, that its effect would not be felt by the user for weeks, that the diet was rigid and severe, and that it would be harmful to persons with certain common afflictions. These statements alone were sufficient to support the findings of misrepresentation. Moreover, even if the medical testimony be completely disregarded, the fraud is proved merely by comparing respondents' advertisements with the recommended diet. For instead of permitting one to lose weight painlessly, without hunger, while eating plenty, the diet is a stringent one allowing less than one-half the normal caloric intake.

ARGUMENT

I.

SINCE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE FRAUD ORDER THE COURTS BELOW IMPROPERLY ENJOINED ITS ENFORCEMENT

As this Court said in *Leach v. Carlile*, 258 U. S. 138, 139-140 “* * * the applicable, settled rule of law is that the conclusion” of the Postmaster General as to whether the product respondent “was selling * * * was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public” is one which “will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary.” This rule, which had become axiomatic in the lower courts,¹ was reiterated in *Donaldson v. Read Magazine*, 333 U. S. 178, 186: “We consider * * * all of the evidence, not to resolve contradictory inferences, but only to determine if there was evidence to support the Postmaster General’s findings of fraud. *Leach v. Carlile*, 258 U. S. 138, 140”.

Both courts below attempted to distinguish the *Leach* case on the ground that there the product or scheme offered for sale constituted a “* * * panacea or cure-all article * * *” whereas here the fraud charged consisted of a scheme of

¹ *Farley v. Heininger*, 105 F. 2d 79 (C. A. D. C.), certiorari denied, 308 U. S. 587; *Farley v. Simmons*, 99 F. 2d 343 (C. A.

specific deception (R. 71-72).^{*} But whether a product is falsely claimed to be a cure for one affliction or many cannot affect the scope of judicial review of the administrative finding. The principle governing judicial review of administrative action equally is applicable whether the product involved in a mail fraud proceeding is one sold as a remedy for dandruff or as the elixir of life. The question in either case would be whether there is substantial evidence to support the decision of the Postmaster General that the claims made for the product are so exaggerated as to perpetrate a fraud upon the public.

There can be no question as to the existence of substantial evidence to support the findings of fraud made herein by the Postmaster General. This is no border line case; all the evidence, even that introduced by respondent, discloses

D. C.), certiorari denied, 305 U. S. 651; *Pike v. Walker*, 121 F. 2d 37, 73 (C. A. D. C.), certiorari denied, 314 U. S. 625; *Cable v. Walker*, 152 F. 2d 23 (C. A. D. C.), certiorari denied, 328 U. S. 860; *Ayeock v. O'Brien*, 28 F. 2d 817 (C. A. 9); *Jarvis v. Shackelton Inhaler Co.*, 136 F. 2d 116, 119 (C. A. 6); *Putnam v. Morgan*, 172 Fed. 450 (C. C. S. D. N. Y.); *Elliott Works, Inc. v. Frisk*, 58 F. 2d 820 (S. D. Iowa); *Branaman v. Harris*, 189 Fed. 461 (C. C. W. D. Mo.); *Missouri Drug Co. v. Wyman*, 129 Fed. 623, 629 (C. C. E. D. Mo.).

^{*} The distinction clearly misapprehends the meaning to be attached to "panacea" as that word was used in the Court's opinion in *Leach v. Carlile*. "Panacea" refers to any scheme which exaggerates the efficacy of a product beyond the range of permissible difference of opinion, rather than to a cure-all.

fraud. Respondent in advertisements, cleverly calculated to appeal especially to the ignorant and credulous, made promises which no product known can meet—to melt fat rapidly, safely, painlessly while one ate plenty—promises which he fulfilled with a handful of dried seaweed and a suggested diet, placed at one-half subsistence level. The seaweed was worthless and the diet neither painless nor safe. The specific representation that the plan helps you lose 3 to 5 pounds a week while continuing to “eat such things as ice cream, cake, candy, beer and all the other things you like.” * * * You just cut down on them” is refuted by the diet itself and its caloric content.

Respondent cannot justify its advertising by reason of the vagueness of such expressions as “Eat Plenty,” or the possible literal truth of the statement that you “don’t cut out fatty, starchy foods, just cut down on them”, as applied to a diet which contains “one slice thinly buttered bread” per day, *inter alia* (R. 16, 26). For when read with the accompanying exhortation to “Eat Plenty * * * Eat as You Usually Do,” the advertisement as a whole conveys the impression, undoubtedly deliberately, that only a minor curtailment is required. As this Court recently declared in *Donaldson v. Read Magazine*, 333 U. S. 178, 188–189:

Advertisements as a whole may be completely misleading although every sentence separately considered is literally true.

This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead.

* * * Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. * * * People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. "Laws are made to protect the trusting as well as the suspicious." *Federal Trade Comm'n v. Standard Education Society*, 302 U. S. 112, 116.

Nevertheless, both courts below found in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, authority for overturning the action of the Postmaster General. The district court found: "that there was no substantial evidence in fact, and could be none, to support the order" because, borrowing the language of the *McAnnulty* case, there is "no exact standard of absolute truth by which to prove the assertions [made for the Kelp-I-Dine plan] false and a fraud." The court of appeals did not go as far as "to say that the value of the * * * plan * * * is not subject to proof as an ordinary fact"; but it affirmed the judgment below on the ground that, here, "there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General." (R. 72.)

The testimony given by the expert witnesses the court below considered "in the nature of opinion" only, and, consequently, not competent' under the *McAnnulty* case to support the fraud order.

The *McAnnulty* case, however, will not support the burden put on it by the court below. As we shall show (*infra*, p. 24, *et seq.*), nothing in it makes testimony by medical experts incompetent in proceedings designed to reach the false advertising of nostrums. In many cases involving other weight reducing products, orders based upon similar evidence have been sustained by this and other courts. *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 316 U. S. 149; *E. Griffiths Hughes v. Federal Trade Commission*, 77 F. 2d 886 (C. A. 2), certiorari denied, 296 U. S. 617; *Fanning v. Williams*, 173 F. 2d 95 (C. A. 9); *United States v. 62 Packages*, 142 F. 2d 107 (C. A. 7), certiorari denied *sub nom. Raladam Co. v. United States*, 323 U. S. 731; *Sekor Corp. v. United States*, 139 F. 2d 197 (C. A. 5); *Stanton v. Federal Trade Commission*, 131 F. 2d 105 (C. A. 10). Thus, there can be no question that the court below was in error in

¶ Although the Court of Appeals did not in terms describe the expert evidence as incompetent or inadmissible, it did hold that such evidence could not be considered in support of the order. Since the effect is precisely the same as if such evidence had been held not competent, it seems proper so to characterize the decision.

holding that the fraud order was not supported by substantial evidence.

II

EXPERT MEDICAL TESTIMONY, EVEN THOUGH THERE IS A CONFLICT IN THE EVIDENCE, IS COMPETENT TO SUPPORT A FINDING OF FRAUD BY THE POSTMASTER GENERAL

In weighing the propriety of the action taken by the Postmaster General, the court below excluded from consideration all the testimony given by the medical experts on the ground that it was "evidence in the nature of opinion" only, based upon discussions with other members of the profession and a general reading of authoritative textbooks, not "ordinary factual evidence" founded upon "scientific research and tests," and that the testimony indicated "that with respect to the efficacy of appellee's product and plan there are two schools of thought, albeit one may be outmoded and fallacious in the opinion of a majority of the * * * medical profession" (R. 73, 74). The court's opinion leaves in doubt whether expert medical testimony of this sort would be insufficient to support a finding of fraud under all circumstances or only where a conflict in such testimony, or other evidence, indicated a difference of opinion in the medical world. We shall show that whichever view is taken, the opinion below cannot be reconciled with this Court's decisions or with a long line of decisions in the lower

courts which this Court has repeatedly refused to review.

A. THE MCANNULTY CASE AND THE SUBSEQUENT AUTHORITIES

As authority for its opinion the court below relies almost exclusively on *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. The complaint in that case alleged that the complainants were doing business on the theory "that the mind of the human race is largely responsible for its ills" and that "proper exercise of the faculty of the brain and mind" can "control and remedy" these ills. *Id.* at 96. It further alleged that "no fraud, deceit, deception or misrepresentation of any kind has ever been practised by them" and that those who received the treatment did so with knowledge of the principle upon which it was based. (*Id.* at 101.) The Government filed a demurrer, apparently on the ground that under the statute the Postmaster General's ruling was unreviewable.¹⁰ Thus under the pleadings these allegations that the complainants' representations were not deceptive stood admitted; the court did not have before it any record of a hearing containing expert or other testimony, but merely a recital that the representations were not false and that the Postmaster General had made a

¹⁰ In denying a temporary injunction prior to the filing of the demurrer the lower court had so held. See Transcript of Record, October Term 1902, No. 27, pp. 7, 14, 15, 19-23; Brief for Appellants, pp. 2-3.

contrary finding. On this state of facts it was held that the Postmaster General lacked the power to issue a fraud order. "There is no exact standard of absolute truth," this Court said, by which to prove the claim of the ability to effect cures through the mind "false and a fraud." It cannot be "the subject of proof as of an ordinary fact." Since "intelligent people may and indeed do differ among themselves" as to the effect of the mind upon the body the efficacy of the treatment must remain "matter of opinion in any court." Therefore, the Court concluded fraud could not be found, as it could not be "proved as matter of fact" that those who entertain the opinion that diseases can be cured through the mind "obtain their money by false pretenses or promises" (187 U. S. at 103-107). The opinion did not foreclose the Government from disproving the allegations of the complaint at the trial.¹¹

In the *McAnnulty* case there was an undenied allegation that the representations were true; that obviously is an adequate basis for setting aside a fraud order in the absence of a record of hearing. Secondly, the Court assumed that in the year 1902 the efficacy of cure through the mind was a matter not susceptible of proof as a fact, that no one could prove that such treat-

¹¹ "In overruling the demurrer we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants as in fact conducted amounts to a violation of the statutes as herein construed." 187 U. S. at 111.

ments were lacking in therapeutic value. Finally, the Court treated the case as one in which there were two conflicting schools of honest medical opinion, neither of which could be proved false in fact. None of these features is present in this case or in the large number of subsequent cases involving false representations as to the curative value of medicinal preparations. Nevertheless, repeated attempts have been made—until this case, comparatively unsuccessfully—to draw from the language of the *McAnnulty* case unwarranted restrictions on the power of the Government to curb the sale of fraudulent nostrums.

This case is not the first in which this Court has been called upon to pass on the contention that the *McAnnulty* case precludes a finding of misrepresentation based on conflicting medical testimony as to the value of a remedy. The opinion below appears to conflict squarely with this Court's disposition of that question in *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643. That case, like the instant one, involved a reducing aid, Marmola, whose chief active ingredient was thyroid, but which also incidentally contained dried seaweed, identified there as "Extract Bladderwrack." Transcript of Record, *Federal Trade Commission v. Raladam Co.*, No. 484, October Term, 1930, pp. 9, 422. Marmola was represented to be a scientific remedy which removed excess flesh safely, pleasantly, without dis-

comfort or danger to the health. At a hearing held by the Federal Trade Commission to determine if these representations were false and misleading, eleven physicians testified, six for the Commission and five for the defendant. All eleven men were, as the trial examiner found, "of high standing in their profession." (*Id.*, p. 466.)

The testimony they gave was in no case based on actual use of Marmola, but rested on their general scientific knowledge, particularly of obesity and of the effect of thyroid on metabolism and weight. So sharp was the conflict in their evidence that the trial examiner found himself unable to reach a determination of the issues. *Id.*, p. 468. The Commission, however, on the basis of their testimony found that Marmola did not meet the representations made for it. Among other things, the Commission found that it could not be used without discomfort, inconvenience or danger, and that it was not a scientific method for the treatment of obesity (*ibid.*, pp. 23-25). On appeal, the order entered by the Commission on these findings was attacked on two grounds. First it was urged that the representations as to the safety and scientific character of "Marmola" were matters of opinion, not fact, and consequently the determination of their truth lay outside the power of the Commission. Second, it was contended that the Commission lacked jurisdiction because the evidence showed no injury to competitors. Both

contentions were sustained by the court of appeals. *Raladam Co. v. Federal Trade Commission*, 42 F. 2d 430 (C. A. 6).

This Court was asked to review both points, but in granting the writ this Court requested that briefs and argument be limited to the question of jurisdiction.¹² 282 U. S. 829. The reason for this became clear in the opinion where, before passing to the question of jurisdiction, this Court summarily disposed of the alternate ground on which the Court of Appeals had based its decision. "Findings, supported by evidence, warrant the conclusion that the preparation is one which cannot be used generally with safety to physical health except under medical direction and advice. If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed." 283 U. S. at 646. The Court, however, found jurisdiction lacking, because there was no evidence of injury to competitors.

So definitely did this opinion put the quietus on the contention that findings of fact could not be predicated on conflicting medical testimony as to

¹² The Raladam Company, nevertheless, forcibly argued the second point in its brief, relying heavily on extensive quotation from the *McAnnulty* case. (*Federal Trade Commission v. Raladam Co.*, No. 484, October Term, 1930, Brief for the Raladam Company, pp. 47-51.)

therapeutic value that when, some eleven years later, the Raladam Company again found itself before this Court in a subsequent proceeding, in which there was again conflicting medical testimony,¹³ no attempt was even made to attack the order of the Commission on any ground other than jurisdiction. The contention that the representation made on behalf of Marmola was a matter of opinion, not fact, was completely abandoned. Jurisdiction being established, the order of the Commission was sustained without further inquiry. *Federal Trade Commission v. Raladam Co.*, 316 U. S. 149.

The summary rejection by this Court in *Federal Trade Commission v. Raladam Co.* of any attempt to extend the *McAnnulty* case beyond its facts was presaged in *Leach v. Carlile*, 258 U. S. 138. That case, like this, involved a mail fraud order. Relying on the *McAnnulty* case, *Leach*, too, argued that since there was a conflict in the evidence in the record as to the value of the substance marketed by him as a remedy for nervous disorders and sexual weakness, the effectiveness of his product was a mere matter of opinion and could not form the basis of a charge of fraud. The Court found it unnecessary to decide whether such a state of facts would bring the case within the *McAnnulty* decision, inasmuch as, apart from

¹³ Nine doctors testified for the Federal Trade Commission and five for the Company. See Transcript of Record, No. 826, 1941 Term.

the possible conflict as to whether the product was "entirely worthless," there was "abundant ground" for the finding that it was not "the panacea" which it was advertised to be. But the subsequent characterization of the issue as to whether the product was such a panacea as "a question of fact * * * committed to the decision of the Postmaster General" indicates that questions of this sort are not to be regarded as mere matters of opinion.

Clearly in the *Raladam* case this Court passed upon and summarily rejected the very contention made here, and held that expert medical testimony, based on general scientific training and knowledge, constitutes substantial evidence of misrepresentation of popular nostrums, even when there is a conflict of opinion.

The lower courts have almost uniformly reached the same conclusion, contrary to that of the court below in the case at bar whether that decision be regarded as holding expert testimony always incompetent, or only when the experts do not agree. Findings of misrepresentation based on the testimony of medical experts as to the therapeutic value of the product involved have consistently been sustained as supported by substantial evidence, even though the experts were testifying from general knowledge, not specific experience with the product concerned. The courts of appeal for eight circuits have so held in 22 cases. *Farley v. Heininger*, 105 F. 2d 79, 83-84 (C. A.

D. C.), certiorari denied, 308 U. S. 587; *Warner's Renowned Remedies Co. v. Federal Trade Commission*, 140 F. 2d 18 (C. A. D. C.), certiorari denied, 322 U. S. 754; *Todd v. Federal Trade Commission*, 145 F. 2d 858 (C. A. D. C.); *Cable v. Walker*, 152 F. 2d 23 (C. A. D. C.), certiorari denied, 328 U. S. 860; *E. Griffiths Hughes v. Federal Trade Commission*, 77 F. 2d 886, 887 (C. A. 2), certiorari denied, 296 U. S. 617; *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. A. 2), certiorari denied, 308 U. S. 616; *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. 2d 676, 678-679 (C. A. 2); *Associated Laboratories v. Federal Trade Commission*, 150 F. 2d 629 (C. A. 2); *Neff v. Federal Trade Commission*, 117 F. 2d 495 (C. A. 4); *Goodwin v. United States*, 2 F. 2d 200, 201 (C. A. 6); *Summers v. McCoy*, 163 F. 2d 1021 (C. A. 6), certiorari denied, 323 U. S. 855; *Simpson v. United States*, 241 Fed. 841, 844-845 (C. A. 6); *Dr. W. B. Caldwell v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. A. 7); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 169 (C. A. 7); *Irwin v. Federal Trade Commission*, 143 F. 2d 316, 324 (C. A. 8); *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. A. 9), certiorari denied, 314 U. S. 630; *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85, 86 (C. A. 9), certiorari denied, 317 U. S. 679; *Philip R. Park, Inc. v. Federal Trade Commission*, 136 F. 2d 428 (C. A. 9); *Ultra-Violet Products v. Federal Trade* ●

Commission, 143 F. 2d 814, 816 (C. A. 9); *Research Laboratories v. United States*, 167 F. 2d 410 (C. A. 9), certiorari denied, 335 U. S. 843; *Fanning v. Williams*, 173 F. 2d 95 (C. A. 9); *United States v. One Device*, 160 F. 2d 194, 198-199 (C. A. 10); *United States v. Seven Jugs of Dr. Salsbury's Rakos*, 53 F. Supp. 746, 757 (D. Minn.).

And the fact that the medical testimony may have been in conflict has been held by six courts of appeals in 10 cases to be no impediment to the power of an administrative agency to resolve the questions of fact raised in proceedings involving fraudulent nostrums. *E. Griffiths Hughes v. Federal Trade Commission*, 77 F. 2d 886, 887 (C. A. 2), certiorari denied, 296 U. S. 617; *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. A. 2), certiorari denied, 308 U. S. 616; *Neff v. Federal Trade Commission*, 117 F. 2d 495, 497 (C. A. 4); *United States v. Dr. David Roberts Veterinary Co.*, 104 F. 2d 785, 788 (C. A. 7); *United States v. 62 Packages*, 142 F. 2d 107 (C. A. 7), certiorari denied *sub. nom. Raladam Co. v. United States*, 323 U. S. 731; *Irwin v. Federal Trade Commission*, 143 F. 2d 316, 323-324 (C. A. 8); *Alberty v. Federal Trade Commission*, 118 F. 2d 669 (C. A. 9), certiorari denied, 314 U. S. 630; *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85, 86 (C. A. 9), certiorari denied, 317 U. S. 679; *Warner's Renowned Remedies Co. v. Federal*

Trade Commission, 140 F. 2d 18 (C. A. D. C.),¹⁴ certiorari denied, 322 U. S. 754; *Todd v. Federal Trade Commission*, 145 F. 2d 858 (C. A. D. C.); see also, *United States v. Seven Jugs of Dr. Salsbury's Rakos*, 53 F. Supp. 746, 759 (D. Minn.); *Branaman v. Harris*, 189 Fed. 461, 467-468 (C. C. W. D. Mo.).

It is to be noted that in a number of these cases in which there was conflicting expert testimony this Court denied petitions for certiorari. See *E. Griffiths Hughes*, *Alberty*, *Warner's Renowned Remedies Co.*, *John J. Fulton*, and *Haynes* cases, all cited in the preceding paragraph. Although this does not indicate the Court's views as to the merits of the cases, presumably certiorari would have been granted if the Court had regarded the decisions below as in conflict with its own *McAnnulty* ruling. An alleged conflict with *McAnnulty* was the primary basis for the petitions for certiorari in the *E. Griffiths Hughes*, *Alberty* and *Warner* cases, the first two of which involved other weight reduction remedies.

B. APART FROM AUTHORITY, THE RULE EXCLUDING EXPERT MEDICAL TESTIMONY FROM CONSIDERATION, WHETHER OR NOT IN CONFLICT, HAS NO SUPPORT IN REASON.

1. *Expert medical testimony as to lack of therapeutic value is an adequate basis for a find-*

¹⁴ The nature of this case is not disclosed by the *per curiam* opinion of the Court of Appeals, but appears in the petition for certiorari filed in this Court.

ing of misrepresentation.—The rule excluding expert medical testimony from consideration, seemingly adopted by the court below, is not only opposed to the weight of authority but is without support of any character. If construed to render incompetent all expert testimony except that based on specific experiments, it disregards accepted and established practice concerning competent and relevant evidence. See *Spring Co. v. Edgar*, 99 U. S. 645, 657; *Kershaw v. Tilbury*, 214 Cal. 679, 691–692, 8 P. 2d 109, 114; *Boswell v. State*, 114 Ga. 40, 42–43, 39 S. E. 897; Wigmore, *Evidence*, (3rd Ed., 1940) Secs. 665b, 687; Rogers, *Expert Testimony* (3rd Ed., 1941), p. 72; Mundo, *The Expert Witness* (1938), pp. 38–39. Its general adoption would effectively strangle consumer protection by federal administrative agencies. In this field expert medical opinion testimony is the only feasible method of proof. A layman is incompetent to testify on medical questions, and he may not give hearsay testimony as to the conclusions of his attending physician. Thus, even in as simple a case as this, to establish by specific experiment the already well understood medical facts that were testified to by the medical experts, would require at least two separate clinical studies. One group of healthy obese individuals, and another group of overweight sufferers from kidney or heart disease, in numbers large enough to be representative and divided for control purposes, would be required to follow the “Kelp-I-Dine Plan” for a reason-

able period of time. We do not believe that the court below intended to require clinical experimentation that would actually jeopardize life. But if medical opinion evidence is incompetent, no alternative method exists for proving that respondent's diet cannot be followed "safely" by all, as is advertised, but is dangerous to persons having particular disabilities.

In fact, specific tests of fraudulent nostrums have been considered and rejected simply because of the danger to life that lurks in them. *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85, certiorari denied, 317 U. S. 679. To require such studies, as does the court below, as a condition precedent to controlling the sales of the various nostrums that purport to cure diabetes, cancer, tuberculosis, and other equally grave ailments would mean that the Government would be faced with the impossible alternative either of jeopardizing the health, or even the lives, of a selected group in order to prove the worthlessness of a particular remedy, or of permitting the fraudulent seller to continue indefinitely endangering the lives of an indeterminate number of his uninformed patrons. The American public should not be made experimental animals through which to prove in each case as it arises those medical facts that are part of the every day working knowledge of experienced and skilled medical practitioners.

The rule announced in the decision below ignores fundamentals in present day medical practice—principal of which is that today therapeutic measures are the products of rational sciences. Knowledge of the mechanism of body functions in sickness and in health, and of drug action founded upon pharmacological studies, has made it possible to establish the medical facts on which to evaluate the true worth and the limitations of therapeutic agents. New agents must, of course, be subjected to pharmacological experimentation and clinical study, but it is foolish to suggest that elaborate trials of nostrums must be made before a qualified expert may testify as to their therapeutic value or lack of value. Any general practitioner can say with certain knowledge that kelp, a well understood article, will have no effect on body weight and that a person on 1000 calories per day will lose weight. To require confirmation in the clinic of these facts as a condition precedent to the prevention of medical fraud is without foundation in reason.

Even were experiments of this character not dangerous to life, they would be costly and time consuming, would require special facilities, and would be feasible in a limited number of cases each year. Enforcement of the various measures which protect the public against fake panaceas would be virtually brought to a standstill.

Nothing in the *McAnnulty* case justifies the refusal to consider expert testimony. The invocation of that case by the court below to bar all such testimony as "opinion" evidence is little more than a play upon words. By a "matter of opinion" this Court in the *McAnnulty* case meant a statement whose truth, not being susceptible of objective evaluation, must necessarily remain subjective; the "opinion" evidence involved here is the testimony of medical experts with respect to matters of scientific fact as to which they were qualified to testify. Although for the purpose of disqualifying all such testimony the court below arbitrarily characterized it all, regardless of content, as opinion evidence, much of it was not "expert opinion" but "expert testimony as to facts" (McKelvey, *Evidence* (5th Ed.), Secs. 181-185, pp. 338-343). Without attempting to draw any exact line of demarcation between facts and opinion, it is clear that much of the following testimony is factual in nature: that the diet prescribed by respondent was a low calorie diet; that such a diet will not necessarily produce a loss in weight of from 3 to 5 pounds a week; that it is dangerous for a person suffering from kidney or heart disease to follow a low calorie diet; that a loss of from 3 to 5 pounds a week is too rapid for health; that a person on a low calorie diet suffers discomfort and hunger which will not be affected by an increased intake of iodine, or other

minerals; and that .4 milligram of iodine a day and a small amount of mineral matter will have no effect upon weight. Obviously, it does not follow, because matters of opinion incapable of reduction to a factual basis will not support a fraud order, that matters of scientific fact cannot be established by the "opinion" or expert testimony of qualified medical witnesses in a fraud order proceeding.

An administrative agency or a court would be justified in excluding expert testimony that was nothing more than a theory or guess, but that should not be confused with the evidence involved in the present case. The testimony given was based on the actual experience of the medical profession generally in the treatment of obesity, and in the use of iodine; on knowledge of the results of specific experiments on the value of iodine; on general scientific knowledge; and on authoritative texts. It was stated to be in accord with the consensus of medical opinion. The conclusions expressed were not mere personal opinions, but were bottomed on well-known medical, pharmacological, and physiological principles established through experiments, observations and research on nutrition, metabolism, and other factors, causing weight changes in human beings. As was said in an identical case, "The testimony of the medical witness in the instant case does not lie within the realm of speculation

which characterized the *McAnnulty* case, *supra*. The susceptibility to proof of an allegation that bodily ills are controllable by the mind is one thing, the question of the effect of tablets on bodily hunger, and the safety and ease with which they may be taken, quite another. The tablets were analyzed by accepted scientific techniques and their contents established. Testimony of the effect on the body tissue of the ingredients they contain is no more 'speculative opinion' than are the known effects of swallowing sulphuric acid." *Fanning v. Williams, supra*, 173 F. 2d at 97.

2. *The existence of conflicting medical expert testimony does not prevent a finding of misrepresentation.*—Even if the opinion below is read as excluding expert testimony only where there is a conflict in medical opinion, it is equally indefensible. Certainly, under the general rules of the law of evidence, testimony does not become incompetent whenever contrary evidence is introduced. Its weight may be affected, but not its admissibility. Since there are few remedies so worthless that someone cannot be found to swear to their virtues, there would be little difference in practice between such a conditional bar and the complete exclusion of expert testimony. The ease with which "expert" witnesses can be obtained to testify on behalf of almost anything is well known. In the false advertising of medical products defendants have been able to produce

experts to sustain even the most extreme claims.¹⁵ The trier of the facts should be permitted to evaluate the expert testimony and to conclude, if such be the case, that the so-called experts on one side are either ignorant or charlatans.

In *Stanton v. Federal Trade Commission*, 131 F. 2d 105 (C. A. 10), an order directed against another "antifat" remedy containing bladderwrack (another term for kelp) and iodine was upheld. The mere fact that the defendant here managed to get a doctor to testify in his behalf should not immunize a product which other reliable testimony proves to be worthless. The many cases referred to on pages 32-33, *supra*, including the *Raladam* decision in this Court, demonstrate that the *McAnnulty* case has not been regarded as standing for any such rule.

¹⁵ For example, a manufacturer selling a simple device for the injection of water into the body through the rectum as a treatment for such conditions as appendicitis, arthritis, asthma, colitis, constipation, excessive fatigue, foul breath, headache, gall bladder complications, high and low blood pressure, indigestion, irregular heart, kidney and bladder complications, liver complications, lumbago, menopause disturbances, muddy or pimply complexion, migraine, nervousness, pruritis ani, rheumatism, sinus trouble, rundown condition, shortness of breath, sleeplessness, ulcers of the stomach and bowels, and ulcerated colitis, was able to secure two witnesses duly licensed to practice as chiropractors and qualified as experts to support his claims. *Ircin v. Federal Trade Commission*, 143 F. 2d 316 (C. A. 8).

For, as we have shown, *supra*, pp. 37-38, matters of the sort here involved are essentially factual. Whether kelp is a remedy for obesity is provable as a fact. The Court assumed in the *McAnnulty* case that this was not true as to remedies operating upon the mind.¹⁶ But the Court in that case did not say that matters provable in fact could not be proved by expert evidence based upon general familiarity with a scientific subject, nor that such evidence must be disregarded whenever conflicting testimony appears. At most, the *McAnnulty* case indicates that the fraud order statute was not designed to permit the Postmaster General to resolve differences of opinions between two schools of medical thought as to matters not susceptible of factual proof.¹⁷ Certainly, the mere availability to the defendants on a charge of medical fraud of a cooperative medical witness cannot in and of itself suffice to immunize their conduct.

¹⁶ It may be that scientific advance in the fields of psychiatry and neurology since 1902 would not warrant a similar assumption today.

¹⁷ Although it may be hard to distinguish *in vacuo* between the two types of conflicting medical testimony, little difficulty is encountered in practice in differentiating between a subject as to which reputable scientists disagree and those in which a purveyor of a nostrum is able to produce "experts" to testify in his behalf. This case clearly falls in the latter category. See pp. 37-38, *infra*.

Until this case, the courts have repeatedly rebuffed attempts to draw from the *McAnnulty* case doctrines that would impose additional limitations upon the substantial evidence rule in determining the propriety of administrative action taken against fraudulent drugs and cosmetics. The decision below goes flatly against this weight of authority. Unless it is reversed, the principles it purports to derive from the *McAnnulty* case will effectively cripple action not only by the Postmaster General, but also by the Federal Trade Commission and the Food and Drug Administration, against sellers of fraudulent nostrums and remedies.

III

THERE WAS NO CONFLICT IN THE TESTIMONY HERE AS TO THE BASIC ELEMENTS OF THE FRAUD

Even if there were some merit in respondents' contention that a conflict in medical testimony renders such evidence incompetent, the finding of the Postmaster General should be upheld. The evidence in this case shows no conflict of opinion on the basic propositions which proved the fraud.

Although there was an intimation that kelp had once been thought useful in reducing, the medical expert called by respondent, a general practitioner and admittedly not a specialist in obesity or an expert in the field of metabolism (R. II, 194), testified that if it had any value for that purpose such value lay in its iodine content (R. II, 176). He

admitted that where iodine is prescribed to affect metabolism, it is in a different form and in a quantity vastly greater than the infinitesimal amount contained in a half teaspoonful of seaweed (R. II, 192, 197, 185-8). Although he deduced that even such a small amount of iodine would increase metabolism "slightly" (R. II, 204, 207-8), he admitted that neither he nor any medical authority with which he was familiar had ever prescribed such an amount (R. II, 208-10, 214). In addition, he admitted that the effect of the iodine would not be felt for "weeks" (R. II, 200). In view of these admissions, the differences of opinion among the experts as to the effect of iodine upon weight when prescribed in proper form and in adequate quantities was clearly immaterial. For the amount of iodine in kelp would obviously be of no consequence, even assuming the correctness of his statements, in any reduction of weight. Thus, the kelp was in fact worthless, as the Government's witness stated.

Respondents' expert also stated that the iodine in Kelp-I-Dine "will increase the appetite a little" (R. II, 203), a statement hardly consistent with his remark on direct examination that respondents' plan would curb the appetite (R. II, 176-7). And his statement that the diet was "severe" and "rigid" (R. II, 200), containing only a thousand calories (R. II, 170) (less than half the average American diet (R. II, 55)) is

not consistent with his earlier statement that the diet is "easy"—and with the representation in respondents' advertising to that effect. His concession that it would be harmful to give the diet to persons having tuberculosis, anemia or heart trouble (R. II, 184) is also inconsistent with his earlier testimony, made without qualification, that the plan was safe (R. II, 179)—and with respondents' advertising to that effect.

Even if the court below had been correct in excluding the medical testimony from consideration in determining whether or not there was substantial evidence to support the fraud order, it should nevertheless, have sustained the Postmaster General. The advertisements, together with the copy of respondent's diet, in themselves constitute substantial evidence of fraud. As the advertisements of the Plan show, the purchaser of the "Kelp-I-Dine Reducing Plan" is led to believe that through it he will lose weight rapidly without materially changing his diet. They suggest a magic formula which will permit him his usual dietary indulgences but will simultaneously give him the lissome figure he desires. Their theme is always that one can painlessly, without self discipline, and with only minor adjustments in one's diet, lose weight rapidly, safely and easily. In fact, the overweight person who buys the Plan finds that he is required to go on a stringent diet from which has been eliminated most of the fattening items of food to which he

is addicted. *Supra*, pp. 6-7, where the diet recommended by respondent is reproduced (R. 26-27). The most cursory examination of this recommended regimen shows that one cannot follow it and also "eat plenty." Alone, it is sufficient evidence of fraud to support the action taken.

It is thus apparent that there was no real conflict in the expert testimony as to the worthlessness of the kelp in contributing to the loss of weight advertised by respondent or as to the severity of the diet, which were the basic matters as to which respondents' advertisements were deceptive. No honest differences of opinion, no controversial schools of thought nor any of the other indicia of lack of knowledge which might provide an occasion for the use of the doctrine of the *McAnnulty* case were brought to light. Far from showing two schools of thought the evidence in this case revealed the complete lack of controversy in the medical world on the basic points involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the cause remanded to the District Court with direction to dismiss the complaint.

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SEPTEMBER, 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 31

LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF
NEWARK, IN THE COUNTY OF ESSEX AND STATE
OF NEW JERSEY, PETITIONER

v.

JOSEPH J. PINKUS, TRADING AS AMERICAN HEALTH
AIDS COMPANY, ALSO KNOWN AS ENERGY FOOD
CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

Respondent's brief (pp. 18-23) raises a question as to whether the hearing examiner erred in excluding, both on cross examination and direct examination, certain textual materials offered by respondent. Since this question was not considered by the court below, it has not been discussed in petitioner's brief. In order to answer respondent's contentions this memorandum is respectfully submitted.

Respondent points out (Br. p. 18) that he "sought in every way he could think of to introduce into the Record in this case" certain extracts from medical dictionaries and journals (reproduced at R. I, 36-42), and that the hearing examiner erred in excluding references to these texts on cross-examination of petitioner's witnesses and direct examination of respondent's witnesses (Br. pp. 18-23). At least, respondent urges, "the textbooks and dictionaries * * * unquestionably demonstrated the existence of medical opinion that kelp was effective in treating obesity" (Br. p. 22), and should have been admitted for that purpose. We submit that, if justification were necessary, the applicable rules of evidence would sustain the examiner's ruling. More significant, however, is the fact that the excerpts in question actually became a part of the "Record in this case" and, despite the examiner's ruling, were considered by the Post Office Department Solicitor who made the findings of fact and recommendation. It seems clear, therefore, that, assuming the examiner erred, his error was harmless. It seems equally clear from an examination of the materials in question that they lack the status as "authorities" which respondent attributes to them.

A. With the exception of Alabama (*Lambert v. State*, 234 Ala. 155), all jurisdictions apply the hearsay rule so as to forbid the use of books or treatises as independent evidence of the facts they

assert. *Davis v. United States*, 165 U. S. 373, 377; *United States v. One Device, Etc.*, 160 F. 2d 194 (C. A. 10); *Morton v. Equitable Life Ins. Co.*, 218 Iowa 846; *Peroco's Case*, 273 Mass. 429; Rogers, *Expert Testimony*, p. 284 (1941); Wigmore, *Evidence* § 1693 (3d ed. 1940). The hearing examiner cannot be said to have acted arbitrarily in following the overwhelming weight of authority which prohibits such procedure.

As respondent observes (Br. p. 13), there are sharp conflicts in the cases dealing with the question of when text authorities may be used in cross-examining expert witnesses. Thus, a number of courts prohibit the use of excerpts from texts where a witness has not relied upon those texts in his direct testimony (*Woelfle v. Conn. Mut. Life Ins. Co.*, 103 F. 2d 417 (C. A. 8); *State v. Blackburn*, 136 Iowa 743) and has only referred generally to "the authorities" (*Allen v. Boston Elevated Ry. Co.*, 212 Mass. 191; *Mitchell v. Leach*, 69 S. C. 413). Other courts permit such examination without a showing that the witness relied on the particular texts in question (*Hess v. Lowery*, 122 Ind. 225; *Ganz v.*

¹ Respondent, citing *Bairman v. Woods*, 1 Greene 441 (Iowa, 1848), couples Iowa with Alabama as a state departing from the general rule. But the later decisions in *Bisby v. Railway and Bridge Co.*, 105 Iowa 293, *Etzkorn v. City of Oelwein*, 142 Iowa 107, and *Morton v. Equitable Life Ins. Co.*, *supra*, while not in terms overruling the *Woods* case, expressly reject the Alabama view (see 105 Iowa at 391) and make it clear that "it is error to admit medical works" (142 Iowa at 113-114) as independent evidence.

Metropolitan St. Ry. Co., 220 S. W. 490 (Mo.)) or where it is shown that the witness relied to some degree on authorities in the field (*Rudd v. Hendrickson*, 176 Min. 138; *Laird v. Railroad*, 80 N. H. 377). In every case, however, since the reading of texts for whatever purpose is the use of hearsay, "the treatise-writer must, like every other witness, be shown beforehand to be properly *qualified* to make statements upon the subject in hand. This will require, as in other Hearsay exceptions * * *, another witness who will testify to these qualifications,—which means here the summoning of anyone in the profession * * * of the writer and ascertaining from him the writer's standing as an authority." Wigmore, *Evidence* § 1694 (3d ed. 1940).² See *Stoudenmeier v. Williamson*, 29 Ala. 558, 567; *Ganz v. Metropolitan St. Ry. Co.*, 220 S. W. 490, 496 (Mo.).

It seems sufficient in the case at bar, without considering the relative merits of the divergent rules indicated above, to point out that respond-

² The same qualifications are found in the American Law Institute's *Model Code of Evidence* (1942), which respondent cites (Br. p. 23) as stating the "more liberal rule." Rule 529 of that Code provides that "a published treatise, periodical or pamphlet" (not dictionary) "on a subject of history, science, or art is admissible as tending to prove the truth of the matter stated therein if the judge takes judicial notice, or a witness expert on the subject testifies, that the *writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.*" [Emphasis added.]

ent, in his attempted cross-examination, nowhere showed that his so-called authorities were actually authoritative on the subject under consideration. In fact, one of the experts repeatedly pointed out to respondent's counsel that medical dictionaries and the single text (published in 1928 and which on the face of the excerpt quoted does not help respondent (R. 38)) upon which cross-examination was attempted were not reliable authorities upon which to determine whether kelp was an effective reducing agent (R. II, 100, 103, 105, 110). As is suggested more fully below, this rejection of the dictionaries upon which respondent primarily relies as authoritative medical treatises would appear to have been wholly proper. In any event, respondent's failure to support these works as authoritative warranted their exclusion. Given this circumstance, plus the fact that there is considerable judicial authority for disallowing the type of cross-examination in question even where the texts are "qualified", there would seem to be no merit in respondent's contention that the hearing examiner's rulings were such an abuse of discretion as to require remand of this case. Cf. *Davis v. United States*, 165 U. S. 373, 377; *Woelfle v. Conn. Mut. Life Ins. Co.*, 103 F. 2d 417, 420 (C. A. 8). These cases indicate that "Whatever the correct rule may be, it is apparent that the scope of such cross-examination must necessarily be left largely to the good common sense and

sound judgment of the trial court, whose rulings should be upheld unless they constitute a clear abuse of sound judicial discretion." *Ibid.*

B. Even assuming, however, that the hearing examiner erred in excluding the textual materials, respondent can show no prejudice resulting from this error. For the materials excluded at the hearing were made a part of the brief submitted by respondent to the Solicitor of the Post Office Department (R. I, 25). And it was the Solicitor, not the hearing examiner, who made the finding of fact and recommendation for issuance of the fraud order. In his Memorandum, the Solicitor expressly stated that he had carefully considered the "entire record, including all documents and exhibits and the brief filed on behalf of the respondent" (R. 14). Later in his Memorandum (R. 25-26), addressing himself squarely to the text materials, the Solicitor ruled that "if they were considered as evidence in this case they could only establish what was conceded on cross-examination by one of the expert medical witnesses for the Government, namely, that he has seen statements in medical dictionaries and other books that kelp was at one time used as a treatment for obesity or was reputed to have some value in the treatment thereof." Since the materials were in fact treated as if in evidence, respondent cannot complain of their exclusion.

C. An examination of the materials referred to by respondent (R. I, 36-42) demonstrates their

insufficiency to establish the existence of reliable medical opinion holding kelp an effective treatment for obesity. Most of these books are medical dictionaries or drug catalogues. As was pointed out by the Senior Medical Officer of the Food and Drug Administration when confronted with some of these dictionaries on cross-examination, such compilations are "certainly not" reliable sources for medical research (R. II, 100). A medical dictionary, the same witness stated later in his testimony, "is not a standard work * * * which anybody would go to for the reference as to what certain drugs would do." (R. II, 103). He further stated that the Dr. Dorland's dictionary, referred to in Respondent's brief (p. 6), was not "a reliable authority for the action of drugs. No, it certainly is not." (R. 105.). We quote in the note below additional excerpts from the testimony on this point, which appears in the Record at R. II, 100-114.²

² R. II, 100:

Q. Is Steadman's Medical Dictionary considered a scientific treatise?

A. Not as a scientific treatise for the basis of what certain things will do. It is a rather compendium stating what certain drugs have been used for or that certain drugs have been reputed to have certain value, and so forth. It certainly is not an authority for what drugs are actually, in the modern consensus, shown to do.

Q. You say it is a compendium of medical thought, is it?

A. It is a compendium of reliable and unreliable medical thought. So it will have to be taken with considerable consideration as to that.

These statements merely corroborate what every student of a science or practitioner in a learned profession presumably knows. A lawyer

Q. Is Steadman's considered reliable?

A. Reliable for what?

Q. Reliable in his research.

A. I wouldn't go to it to find out what a drug would do.

Q. I just want you to answer my question.

A. Reliable for research?

Q. Yes, sir.

A. Certainly not.

R. II, 103:

Q. Doctor, what is the reputation of Dorland's "The American Illustrated Medical Dictionary", 1944 edition?

A. I stated that is not a standard work by which anybody would go to for the reference as to what certain drugs would do. You might go to it to see what certain drugs have done or what they have been reputed to have done, but there are no statements made in these dictionaries—for instance, I know of one here a few years ago was carrying the statements to the effect that certain drugs like sarsaparilla, certain plant drugs had value in syphilis. They used to think that thirty or forty years ago before they knew what syphilis was due to, but you can't rely on statements in dictionaries as to what the real effects of drugs are—

Q. You wouldn't rely on such dictionaries—

A. — or drug catalogs.

R. II, 104-5:

The WITNESS. I have seen statements in dictionaries to indicate seaweed has been used as a treatment, or reputed to have some value in the treatment of obesity, yes.

By Mr. FAST:

Q. Have you any basis for stating that that statement is untrue?

A. Certainly, I have. I've—

Q. Well, what is your basis for—

A. — my whole testimony already given is—

would scarcely consider a law dictionary a sufficient authority for a statement of the law,

Q. — well, I'm trying to find out what your authority for your statement is.

A. Way back 35 years ago in 1910, somebody reported that iodine had some value, but since then other people have made tests and have tried the preparations and the *saline* books that once said that iodine might be good for obesity are now saying it has been reputed to be or formerly used or was contained in nostrums sold for obesity, and so forth. But certainly no reputable textbook that I know of dealing with the treatment of obesity and effects of drugs thereon—textbooks that are used as authorities for such statements—I don't know of any of them that say that iodine is effective, or seaweed or any of the minerals or any of the other ingredients in seaweeds have any value for reducing.

Q. Doctor, I asked you did you consider the 1944 edition of "The American Illustrated Medical Dictionary" endorsed by Dr. Dorland as reliable?

A. Not as a reliable authority for the action of drugs. No, it certainly is not.

R. II, 109-110:

A. I said that in my examination of textbooks which I consider the authorities or the place to go for an authority on obesity and the effects of drugs on obesity, the books of internal medicine, in articles published along those lines, as being the places to go for authority as to the consensus of opinion, and also to modern pharmacologists dealing with the action of drugs. I have consulted those and I think I know what the modern opinion is and I've found in none of those any opinion which would lead me to believe that seaweed in this dosage has any value whatever in the treatment of obesity for any purpose.

Q. Now, Doctor, will you be good enough to give us the authorities that you used in coming to that conclusion?

A. I stated that I had looked in all the textbooks of internal medicine dealing with the question of obesity and all the modern pharmacologists.

particularly when every authoritative text said the contrary. It would appear to be at least as inappropriate, and potentially far more dangerous, for a physician to employ a medical dictionary to determine the efficacy of drugs. For a dictionary, exhausting the alphabet in its definitions, can scarcely be deemed an independent source of inductive knowledge or a reliably contemporary compendium of other sources. The same would appear to be true of the drug catalogues from which respondent quotes.

It should be noted that the quotations respondent adduces from dictionaries and catalogues, apart from their inadequate character as authority, scarcely give the impression that any significant body of contemporary medical opinion regards kelp as an effective treatment for obesity. Two of the six state that kelp was "formerly used in * * * obesity * * * on account of iodine content" (R. 37), and that "it is doubtful whether its preparations are capable of reducing human obesity unless given in such doses as to interfere with digestion and injure the health" (R. 37). One dictionary states merely that fucus "has been employed in the treatment of obesity" (R. 36), a phrase which implies that it is no longer so employed. A fourth compendium quoted at length by respondent (R. 38-39) contains nothing to indicate the use of fucus. Only two of the dictionaries continue to use the present tense in their statements that fucus "is used

* * * as a cure for obesity" (Dorland's) (R. 36) and that fucus "is used * * * in obesity" (Gould's) (R. 38).

The other materials presented by respondent scarcely bolster his case. From *Pharmacotherapeutics, Materia Medica & Drug Action* (1928) (R. I, 38), respondent quotes the statement that fucus "was at one time * * * given as an antifat remedy." (Emphasis added.) *The Journal of Pharmacology and Experimental Therapeutics* (1910) (R. I, 39-42), apart from stating that experiments conducted forty years ago showed increased thyroid activity in rats and guinea pigs after they were fed bladderwrack, would appear to be irrelevant to respondent's case. Nor is an article published in 1875 (*Dublin Journal of Medical Science*, R. I, 42), reporting weight losses from fucus, a persuasive substitute for competent medical testimony some seventy years later.

In view of the evidence of the Government's medical expert that no modern scientific medical textbook or other authority recommends kelp as a treatment for obesity (R. 26, R. II, 103, 105, 109), the evidence as a whole fully supports the Solicitor's finding, quoted above, that the material proffered by respondent shows merely that "kelp was at one time used * * * or reputed to have some value" in the treatment of obesity.

D. Respondent also sought to introduce the above material by asking his medical witness in

advance whether he agreed with what was stated in the books, and then reading the excerpts into the record (R. II, 171-3, 175, 181, 182). This effort to place in evidence the opinions of the authors of the books, as distinct from the opinion of the witness, was rejected on the basis of the statement in *Jones on Evidence, Civil Cases* (3d ed., 1924) that "it has been held inadmissible for such a witness to read to the jury from books although he concurs in the views expressed, or to even state the contents of such books though he may refer to them to refresh his memory" (R. 172). To the same effect, see *Thompson v. Amnious*, 160 Ga. 886; *Commonwealth v. Sturtevant*, 117 Mass. 122; *St. Louis, A. & T. Ry. Co. v. Jones*, 14 S. W. 309 (Tex.); *Boyle v. State*, 57 Wis. 472. Rogers, *Expert Testimony* pp. 286-287 (1941). It would have been perfectly proper, of course, for respondent to have permitted the witness to refresh his recollection from the books and then to state his personal views. Inasmuch as respondent made no effort, after the excerpts from the dictionaries were excluded, to ask the witness to state the substance of the views with which he purportedly agreed, it is clear that he was merely trying to get the excerpts from the

books into the record as independent evidence,
contrary to the established rule.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

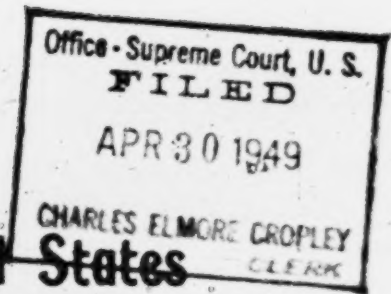
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OCTOBER 1949.

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SUPREME COURT, U. S.



IN THE
Supreme Court of the United States

October Term, ~~1948~~ 1949

No. ~~500~~ 31

LOUIS A. REILLY, as Postmaster of the City of Newark, in
the County of Essex and State of New Jersey,
Petitioner,

v.

JOSEPH J. PINKUS, Trading as American Health Aids Com-
pany, Also Known as Energy Food Center,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE
Supreme Court of the United States

October Term, 1948.

No. 583.

**LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF NEW-
ARK, IN THE COUNTY OF ESSEX AND STATE OF NEW
JERSEY,**

Petitioner,

v.

**JOSEPH J. PINKUS, TRADING AS AMERICAN HEALTH AIDS
COMPANY, ALSO KNOWN AS ENERGY FOOD CENTER,**

Respondent.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.**

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey (R. 59-62) is reported at 71 F. Supp. 993. The opinion of the United States Court of Appeals for the Third Circuit (R. 68-74) is reported at 170 F. (2d) 786.

JURISDICTION.

The judgment of the Court of Appeals was entered October 25, 1948 (R. 76). The Petition for a Writ of Certiorari was filed February 21, 1949, after this Court granted petitioner an extension of time within which to file his Petition. By order of this Court, dated March 22, 1949, the time for filing respondent's brief in opposition to the Petition for Certiorari was extended to and including May 2, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 (1).

QUESTION PRESENTED.

Whether the court below properly held that the Postmaster General had no power to issue a fraud order based upon his opinion that a medical remedy sold by respondent was totally ineffective, where there was a difference of opinion as to the effectiveness of the medical remedy.

STATUTES INVOLVED.

The provisions of Revised Statutes 3929, as amended, 39 U. S. C. A. § 259, and Revised Statutes 4041, as amended, 39 U. S. C. A. § 732, are set forth in the appendix, *infra*, pages 25 to 26.

STATEMENT.

Since approximately 1939, respondent had been engaged in the business of operating a health food store in Newark, New Jersey, and like thousands of such stores, sold kelp to customers who asked for it (R.II 125-6).¹ He had an analysis made of kelp, and also analyzed the substance himself while taking a course in advanced organic chemistry at Montclair State Teachers College (R.II 127). At the same school, he took a course in the chemistry of foods (R.II 135). He also did experimental work in the subject at the Kirksville School of Osteopathy in Missouri (R.II 132).

Respondent discussed the value of kelp in association with a recommended diet or menu with various physicians who were friends of his (R.II 128), and conducted a considerable amount of personal research on the relationship of kelp to obesity (R.II 129-130).

Respondent is a college graduate, and in addition, holds the degree of Master of Arts (R.II 137).

Before marketing his product in connection with a weight-reduction plan, respondent obtained letters from various doctors certifying to the effect of the product

1. References to Volume 2 of the Transcript of the Record will thus be indicated by "R.II".

(R.II 141-2). Based on all the information and knowledge he had acquired, respondent then formulated his reducing plan. His plan consists of daily taking a half teaspoonful of Kelp-I-Dine, which is ordinary kelp, and cutting down on food consumption. For the latter purpose, a suggested diet is included with the package of kelp when it is sent to a customer.

Before putting his product on the market, respondent sent a sample of Kelp-I-Dine to the War Production Board for classification (R.II 142). After Kelp-I-Dine was already on the market, he sent the Federal Trade Commission a copy of a radio advertising script in an effort to determine the propriety of his advertising (R.II 145). Later the Food and Drug Administration suggested a small change in his label, to which he immediately agreed (R.II 145).

Since marketing his product, respondent has received thousands of letters from users of Kelp-I-Dine, a great many of whom said that their doctors had approved (R.II 152-3).

The Government placed in evidence examples of advertising inserted by respondent in various magazines, the substance of which is summarized in a Memorandum prepared by a Solicitor of the Post Office Department for the Postmaster General (R. 16-21), and also circulars sent out in response to test inquiries, and various radio scripts which contained much the same type of statements as were contained in the advertisements (R.II 26-7, 30-35).

A chemist employed in the Food and Drug Administration testified that Kelp-I-Dine was kelp and contained four-tenths of a milligram of iodine in each half teaspoonful (R.II 36).

The remaining proof submitted by the Government consisted of the testimony of two physicians, one a physician in the Municipal Hospital in Washington who was also a professor of medicine, and the other a doctor employed by the Food and Drug Administration. Neither of

them had ever made any test of Kelp-I-Dine or kelp. Their testimony was based exclusively upon their general information and upon the chemical analysis already placed in evidence.

In substance, these physicians testified that kelp was valueless in the treatment of obesity, although Dr. Roberts, the first expert for the Government, did admit that iodine which is contained in kelp would have some effect on obesity in certain cases (R.II 82), whereas Dr. Norris, the Food and Drug Administration physician, while recognizing the iodine contained in kelp (R.II 99), denied that it would have any reducing effect in any case (R.II 97-98). Dr. Norris admitted, however, that he had seen statements in certain medical books to the effect that kelp was used in the treatment of obesity (R.II 104). The Government's medical experts also differed from each other as to the caloric content of the diet portion of respondent's reducing plan. Dr. Roberts thought the recommended diet contained between eleven hundred and twelve hundred calories (R.II 74), whereas Dr. Norris was of the opinion that the diet would afford eight hundred or nine hundred to one thousand calories (R.II 90). The difference between these estimates is more than twenty per cent.

Both physicians agreed that by following the recommended diet contained in respondent's reducing plan, a person could lose a certain amount of weight, and possibly as much as three pounds a week or more (R.II 59, 78, 121). However, these experts testified that in certain cases such a loss of weight might be harmful,—where the person involved had one of a number of chronic diseases such as heart disease, diabetes, tuberculosis, etc. (R.II 118).

The respondent introduced the testimony of a private physician who was a general practitioner and an admitting physician of the City Hospital of Newark, New Jersey. In general, his testimony supported the representations made in respondent's advertising as to the effectiveness of the plan in the treatment of obesity (R.II 169-182), although

he admitted that a reduction of weight might be harmful in certain cases, such as where a person has heart trouble (R.II 184-5).

Following the hearings, an Assistant Solicitor of the Post Office Department, who sat as hearing officer, filed a Memorandum for the Postmaster General dated May 3, 1945, in which he stated that kelp was valueless in the treatment of obesity and recommended issuance of a fraud order (R. 14-26). On May 7, 1945, the Postmaster General issued an order forbidding the Postmaster of Newark, New Jersey, to pay any postal money order drawn to the order of American Health Aids Company and Energy Food Center (respondent's trade names) and their officers and agents as such at Newark, New Jersey, directing him to inform the remitter of any such postal money order that payment was forbidden and that the amount would be returned on request, and instructing him to return all letters and other mail matter addressed to the above firms and persons to the senders with the words "Fraudulent: Mail to This Address Returned by Order of Postmaster General" stamped on the outside of the letters.

The facts with regard to the institution of the present litigation by respondent, the issuance by the United States District Court for the District of New Jersey of an injunction restraining enforcement of the fraud order, and the affirmance of the injunction by the United States Court of Appeals for the Third Circuit are adequately set forth in the Petition for a Writ of Certiorari at pages 9-12 and need not be repeated here.

ARGUMENT.

I.

There Is No Justifiable Ground for the Granting of Certiorari in This Case.

This case is governed by **American School of Magnetic Healing v. McAnnulty**, 187 U. S. 94 (1902). Of that there can be no doubt. Both courts below so held.

The **McAnnulty** Case has been cited in over 100 decisions by federal courts, including the Supreme Court, and by various state courts throughout the country, and has never been discredited. There is clearly no reason to review the case at this late date. Even the Government does not contend the case should be overruled,—and yet without such an objective, there is no basis whatever for certiorari.

There could hardly be a less appropriate case than the present one to serve as a vehicle for a review of the rule of the **McAnnulty** Case. For as both courts below have indicated, the Government's case here is supported by virtually no factual evidence, unlike many of the cases originating in other Governmental agencies having concurrent jurisdiction in the realm of medical remedies. The sole testimony upon the basis of which the fraud order in this case was issued was that of two physicians,—one a Government employe,—who, without any factual or experimental data to support them, voiced the opinion that the remedy in question would not accomplish what it was represented to do.

If, under the false guise of the sanctity of administrative findings of fact when supported by substantial evidence, that type of bald opinion is held to justify the exercise by a single Governmental officer of the most plenary power known to our law, then indeed no pharmaceutical company in the country,—whatever its reputation,—may feel secure. For all these companies have some drugs the efficacy of which may be doubtful. And if the Government's contention in this case is sustained, the opinion of a single doctor called as a witness before an Assistant Solicitor of

the Post Office Department may lead to the business demise of any manufacturer of a medical remedy.

We respectfully point out that the Solicitor General of the United States cannot be too confident of the Government's position on the facts of this case. Otherwise he would not have grasped at straws by going outside the Record, and at this late stage of the proceeding, urging the granting of certiorari here **because of the concern of the Federal Trade Commission and the "Pure Food and Drug Administration"** (i. e., the Federal Security Agency)—Petition, p. 18. Actually, as we shall demonstrate neither of these agencies is affected by, or need have any concern about, the decision in this case.

This is a Post Office Department case. It arises out of statutory provisions relating solely to the Post Office Department. It originated in a hearing before an Assistant Solicitor of the Post Office Department, at which two attorneys of that Department presented the Government's case. And it culminated in the issuance of a fraud order by the head of the Post Office Department to the Postmaster of Newark, New Jersey, upon the recommendation of the Assistant Solicitor who heard the case.

What possible excuse can be presented for the Solicitor General's now, for the first time in the long course of this case, going completely outside the Record in an endeavor to pull the Post Office Department's chestnuts out of the fire by urging the granting of certiorari on the request of the Federal Trade Commission and the Food and Drug Administration? Certainly there can be no basis for the "grave concern" of those agencies asserted by the Solicitor General. In the first place, the entire procedure and operation of these agencies, as well as the statutes governing them, are so completely different from those here involved, as developed later in this brief, that this decision has no such far-reaching effect upon them as is impliedly urged in the Petition for a Writ of Certiorari. Perhaps this is most graphically demonstrated by the fact that the only three cases the Solicitor General was able to cite in

which this decision was "utilized" (Petition—footnote 10, page 18) as the apparent basis for the asserted concern of these other two agencies, involve injunctions entered against the enforcement of fraud orders issued by the **Post Office Department**. And the case books amply establish that the other two agencies (Food and Drug Administration and Federal Trade Commission) have not been impeded in any way whatever in the enforcement of their respective enabling laws in the field of medical remedies by the **McAnnulty** decision or by the decision of the court below.

We can only conclude that the sole purpose of the Government's effort to bring other Governmental agencies into this case by the back door is to lend importance to a run-of-the-mill case which cannot justify certiorari standing alone.

II.

American School of Magnetic Healing v. McAnnulty Governs This Case.

In the **McAnnulty** Case, a fraud order was issued against the company and its principal officers on the ground that they were engaged in a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses. Plaintiffs brought a bill for an injunction against enforcement of the fraud order, in which they averred that their business was (187 U. S. at 96) "founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof," and that the human race possesses the innate power to largely control and remedy its ills and from this source emanates the plaintiffs' treatment.

There were other allegations in the complaint, all of which were admitted by a demurrer filed by the defendant, a local Postmaster. However, in reversing the lower court and instructing it to grant a temporary injunction with leave to the defendant to answer, Mr. Justice Peckham re-

ferred only to this one admission, that is, that the plaintiffs' business was founded on certain principles (p. 103).

The Supreme Court stated that there was no doubt that the mind exerted some influence upon the physical condition of the body and that it was claimed by some that nature could heal without recourse to medicine. The Court admitted that the extent to which these claims could be borne out by actual experience might be a matter of opinion, but that no one could say accurately to what extent mental condition affects the body. Accordingly, the Court held that no one could say it was a fraud for one person to contend that the mind has an effect upon the body greater than even a vast majority of intelligent people might be willing to admit or believe. The Court concluded (p. 104):

“ * * * There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court.
* * * ”

The Court went on to give examples of other medical fields in which there were differences of opinion as to the effectiveness of a particular remedy, and at page 105 generalized its view on this subject as follows:

“ * * * As the effectiveness of almost any particular method of treatment of disease is, to a more or less

extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. * * *

And at page 107, the Court stated:

"It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. * * * **The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes.**"

In the second portion of its opinion, the Court demonstrated that the rule of inviolability of administrative findings of fact did not apply, because here the Postmaster General had committed an error of law as to his power under the applicable statute.

The applicability of the **McAnnulty** decision to the present case is apparent even from the discussion and purported findings of fact contained in the Solicitor's Memorandum to the Postmaster General, without going any further into the Record in the case. In that Memorandum, it is clearly stated that **"The findings of fact made herein are based only upon the medical testimony of the expert witnesses appearing on behalf of both the Government and the respondent"** (R. 25). The pertinent testimony of these witnesses consisted of their **opinions** as to the therapeutic value of respondent's treatment.

Although the Solicitor in his Memorandum discussed various phases of the testimony, his ultimate finding in support of his recommendation for the issuance of a fraud order was "that kelp [the substance sold by respondent as "Kelp-I-Dine"] is valueless in the treatment of obesity" (R. 23), and that although a purchaser is led to believe by respondent's advertising that his product is valuable for the treatment of obesity, "the medical testimony in this case proves that it is valueless for such purpose" (R. 25). The Solicitor, although he paid little attention to the respondent's medical expert, did mention his testimony that kelp, because of its iodine content, was an "antifat for reducing" and "could be used in the treatment of obesity" (R. 23). The Solicitor admitted that the suggested diet forming part of respondent's advertised reducing plan would effectuate a reduction in weight, but stated that the diet was rigid and severe, and that the reduction would not be accomplished without experiencing hunger and the discomforts and strain thereof (R. 23-25).

Finally, the Solicitor stated that one of the expert medical witnesses for the Government conceded on cross-examination that he had seen statements "in medical dictionaries and other books that kelp was at one time used as a treatment for obesity or was reputed to have some value in the treatment thereof" (R. 25-26).

Thus the Solicitor's Memorandum itself shows that there was a conflict of opinion as to the effectiveness of respondent's remedy. The testimony even more strikingly shows the conflict of opinion. There was no contradiction of the facts that the respondent's remedy was backed by years of study and experimentation, that various doctors had certified to its effectiveness, and that thousands of users had written in to endorse the remedy.

And the Record is just as clear that the Postmaster General's ultimate "finding of fact" in support of the issuance of a fraud order, namely, that respondent's remedy was totally ineffective to accomplish the result for which it was advertised and sold, was merely the **opinion**

of the Postmaster General based upon the somewhat divergent **opinions** of the two medical experts appearing for the Post Office Department.

For these reasons, the Court of Appeals, like the District Court, squarely held that the **McAnnulty** decision governed the disposition of this case. The Court stated (170 F. (2d) at 790-1, R. 73-74):

“We feel constrained to affirm the judgment of the court below upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General. We would not be understood to say that the value of the plaintiff-appellee’s plan and product is not subject to proof as an ordinary fact nor that scientific research and tests may not disclose factually and definitely the efficacy of a particular plan or product. We do say that **the evidence upon which the Postmaster General acted was not factual evidence but solely in the nature of opinion evidence.** If there be ordinary factual evidence of the value of the product and plan here involved it was not placed before the Postmaster General. The proceedings in the Post Office Department do not disclose that any scientific test or research was made with the appellee’s product or plan or that the opinions of the medical experts were founded upon the results of any such research or tests. On the contrary, the testimony of the medical experts at the hearing in the Post Office Department seems clearly to have been **founded solely upon professional opinion** based upon a general reading of authoritative textbooks and discussions with other members of the medical profession and indicates that **with respect to the efficacy of appellee’s product and plant there are two schools of thought**, albeit one may be outmoded and fallacious in the opinion of a majority of the members of the medical profession.”

The Court of Appeals indicated, in the foregoing excerpt from its opinion, that the Post Office Department **might** have been able to prove **factually** that respondent's remedy was valueless for the treatment of obesity. While it might be argued that this view deviates somewhat from the principles enunciated in the **McAnnulty** Case (170 F. (2d) at 791, R. 74), we need not now determine its validity, for there can be no doubt of the complete absence of any **factual** evidence of inefficacy of respondent's remedy in the Record of this case.

It was obviously because of this absence of any **factual** evidence supporting the Department's contention that the Solicitor of the Post Office Department, in his Memorandum for the Postmaster General, based his so-called finding of fact solely upon the medical testimony of the Government's witnesses. For there was no attack at all on the factual, as distinguished from the opinion, aspects of this case. The good faith of respondent, his long and careful study and investigation of the effect of his remedy, his consultation with practicing physicians, his receipt of letters certifying his plan from reputable doctors including the Health Officer of the City of Newark, his receipt of thousands of unsolicited testimonials from users of the remedy, many of whom said their doctors approved,—none of these **facts** was refuted or even challenged.

And respondent has always been open and cooperative even with the Governmental agencies referred to by the Solicitor General in his brief as being gravely concerned over this case. He has had contact with the Federal Trade Commission, to whom he referred a radio script for approval, and with the Food and Drug Administration, which approved his labeling after he promptly made the small change which that agency suggested.

As a matter of fact, throughout these proceedings, respondent was **always** willing,—and repeatedly so indicated,—to conform his advertising to the wishes or recommendations of the Post Office Department (R. II 162, 214). But that Department's response was that there was no ma-

achinery by which the respondent could be advised as to the proper scope of his advertising, and that "those using the mails do so at their own responsibility and if they violate the law then and only then does the Post Office step in" (R.II 216).

Thus, so far as facts go, respondent's position in this case is unimpeachable. And beyond those facts, the Post Office Department relied for the issuance of a fraud order solely on the **opinion** of its two medical experts as against that of respondent's medical expert and of the conceded statements in certain medical dictionaries. If **American School of Magnetic Healing v. McAnnulty** means anything, it certainly prohibits such action by the Postmaster General.

III.

Leach v. Carlile Distinguished.

In his Petition for Certiorari, petitioner cites only three postal fraud order cases. **Summers v. McCoy**, 163 F. (2d) 1021 (C. C. A. 6th, 1947), cited at page 19 of the Petition, is a one paragraph *per curiam* opinion which does not reveal any of the facts of the case, and the District Court opinion,—if there was one,—is not published. Obviously, petitioner cannot be placing much reliance on this decision. In **Cable v. Walker**, 152 F. (2d) 23 (App. D. C. 1945), cited at page 19 of the Petition, there was practically no conflict of medical opinion involved, since only the plaintiff testified in his own behalf, and he was a layman with no formal training in any subject related to the medical remedy he was marketing. The Circuit Court of Appeals affirmed the denial of an injunction in an opinion less than a page in length. Obviously, that case can have no weight here.

That leaves only **Leach v. Carlile**, 258 U. S. 138 (1922), upon which petitioner principally relied in both courts below, as he does here. Both the District Court (71 F. Supp. at 995, R. 61) and the Court of Appeals (170 F. (2d) at 789-790, R. 71-72) had no hesitation in holding that **Leach v. Carlile** did not govern the present case.

For a proper understanding of **Leach v. Carlile**, it is necessary to consider first the opinion in the Circuit Court of Appeals for the Seventh Circuit (267 Fed. 61), since the facts and the reasoning leading to the decision by the Supreme Court of the United States are there more fully set forth.

Plaintiff advertised a remedy for sexual weaknesses and disorders in men. A fraud order was issued against him and he sought to enjoin its enforcement.

The Circuit Court of Appeals unequivocally recognized that the **McAnnulty** decision would have required the issuance of an injunction against enforcement of the fraud order had it been based solely upon a finding of total ineffectiveness of a medical remedy, as to the effectiveness of which there was a difference of opinion (267 Fed. at 63-64).

However, the Court stated that "any so-called remedy, however meritorious, may in its exploitation become a subject-matter of fraud". Here the advertisement in question contained such grossly extravagant and unwarrantedly optimistic representations, in a letter and a twenty-page booklet, that the findings of the Postmaster General that those representations were fraudulent had to be sustained. Thus, the plaintiff represented, among other things, that his remedy was being recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline, weakened manhood, urinary disorders, lame back, lack of ambition, energy, sleeplessness and rundown system; that the ingredients could be obtained only in plaintiff's product; that the remedy was compounded in one of the largest and best laboratories in the world, etc.

With regard to these and similar assertions, the Court stated (267 Fed. at 67):

"The record does not warrant the conclusion that even appellant believed such broad assertions, nor that he was a physician or a scientist, or had conducted experiments or investigations; and it does not appear

that he had basis for any belief whatever on the subject. The assertion of special and peculiar merit for 'organo tablets' over and above, testicular products by any other name or style is wholly without basis in fact. * * *

Accordingly, we have in the cited case representations which were obviously false and which the administrator could find even the plaintiff did not believe. It was on this ground that the Circuit Court of Appeals affirmed the decree of the District Court denying an injunction against enforcement of the fraud order.

(The good faith of respondent and his belief in the efficacy of his remedy in the present case could not be, and in fact was not, questioned.)

In the Supreme Court of the United States, the distinction between this case and the **McAnnulty** Case was clearly set forth by Mr. Justice Clarke as follows (258 U. S. at 139-140):

"* * * In argument it is contended that the question decided by the Postmaster General was that the substance which the appellant was selling did not produce the results claimed for it, that this, on the record, was a matter of opinion as to which there was conflict of evidence, and that therefore the case is within the scope of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public. This was a question of fact which the statutes cited committed to the decision of the Postmaster General * * *."

In the present case, the Postmaster General has himself taken the case out of the rule set forth in **Leach v. Carlile** and placed it within the principles of the **McAnnulty** Case by the finding upon which the fraud order was primarily based, namely, that the plaintiff's remedy was **totally ineffective and valueless in the treatment of obesity.**

The Record in this case fully demonstrates the inapplicability of **Leach v. Carlile** and the correctness of the court below in considering the **McAnnulty** decision as binding.²

There were only a few specific representations in respondent's advertising that were even considered in the Solicitor's Memorandum to the Postmaster General. The Solicitor's remarks as to these representations could not possibly of themselves form the basis for a fraud order, and the Solicitor nowhere indicated that they entered materially into the ultimate finding of fraud. As we have already pointed out, the fundamental finding which formed the basis for the fraud order was that respondent's product, as distinguished from the suggested diet which was part of his reducing plan, was valueless in the treatment of obesity.

However, we shall demonstrate briefly that the other minor representations considered by the Solicitor were either themselves matters of opinion within the meaning of the **McAnnulty** Case, or were representations of such restricted scope that in no event could they form the basis for application of the principles enunciated in **Leach v. Carlile, supra.** As the court below pointed out (170 F. (2d) at 790, R. 72), the Government in the present case did not prove or even charge that respondent's advertisements raised hopes of a cure-all panacea.

2 Respondent's advertising included a guarantee that "if you find Kelp-I-Dine does not help you lose weight, return the remainder to us and we will refund you money in full" (R. 16). This was plainly an implicit reservation that respondent's plan possibly did not work in all cases and might not be universally beneficial in the treatment of obesity. Such a money back guarantee has been a factor in distinguishing **Leach v. Carlile, supra.** and in affirming the issuance of an injunction against the enforcement of a fraud order in a case involving a medical remedy. **Jarvis v. Shackleton Inhaler Co.,** 136 F. (2d) 116 (C. C. A. 6th, 1943).

Among the representations considered by the Solicitor was the statement in a few of respondent's advertisements that followers of his plan would lose excess weight with "no strain" (R. 18), and a statement in a radio script that one could thus lose weight "quickly, easily" (R. 19). The Solicitor referred to testimony in the Record that if a follower of respondent's plan adhered to the recommended diet included with the kelp sent to the user, he would be hungry, since the diet was rigid and severe. From this testimony, the inference seems to be drawn that the representations quoted above were untrue.

As the court below indicated, the severity of the diet recommended by respondent was as much a question of opinion as was the inherent value of kelp in treating obesity (170 F. (2d) at 790, R. 72). At best, the statement that the loss of weight would be easy is a mildly puffing remark. Plainly, different individuals following the same diet would do so with varying degrees of ease and comfort. Accordingly, the reference to this portion of respondent's advertising could not be taken seriously as the basis for a fraud order.

Again, the Solicitor referred to testimony in the Record that treatments for obesity should be individualized and prescribed only after scientific diagnosis (R. 24), and that although a follower of respondent's plan might lose as much as three pounds per week, it would not be harmless, particularly if the diet were not scientifically indicated in his particular case (R. 25). In this discussion, the Solicitor was apparently referring to the use of the words "absolutely harmless" and "safe" in respondent's advertising (R. 16, 18).

Here again, there is no evidence of a misrepresentation of fact which could possibly form the basis of a fraud order. In the first place, it is perfectly clear, and all the evidence shows, that kelp is harmless (R. 117), and it is obvious that none of the foods in the recommended diet accompanying the kelp was at all harmful. What the physicians who testified for the Government said was not that respondent's

plan was harmful in itself, but that reduction in weight might be harmful to a particular person under certain circumstances. The distinction is a very important one. Obviously, there is virtually no medical remedy sold over the counter, and probably no food (although we do not profess to be experts on the subject) that would not harm some persons under certain conditions, and in certain quantities. If the fact that an advertised commodity might be harmful to some persons under certain conditions were a proper basis for issuance of a fraud order, we submit that as a matter of common knowledge the Court must conclude that fraud orders could be issued against the best known pharmaceutical and food firms in America solely on the ground that their advertising represented that their products were harmless.

Certainly no Court would sustain a fraud order on so flimsy a basis. In any event, whether or not it might be a laudatory aim of the Post Office Department to bar from the privilege of receiving mail anyone selling a product which under any circumstances might be harmful to any person, obviously the postal fraud statutes do not grant the Postmaster General that authority.

IV.

Other Cases Cited by Petitioner Are Totally Inapplicable.

Aside from **Leach v. Carlile** and the other two postal fraud order cases referred to above, petitioner has cited 17 cases on pages 16-17 and 19 of the Petition. Of these, 12 are cases in which the Federal Trade Commission sought enforcement of cease and desist orders, and 5 are cases involving the Food and Drug laws in which libels were filed by the United States for the seizure of condemned products.

A mere reading of those cases indicates clearly that the courts have gone much further in sustaining the administrative action of the agencies there involved than they have in cases arising under the mail fraud statutes. However, on a legal basis, all those cases are distinguishable and have no place in the consideration of the present situation because they involve different statutory powers

permitting broader and more extensive administrative findings, and actually resulting in very different administrative actions than under the postal fraud statutes pursuant to the decision of the **McAnnulty Case**.

Thus, Section 5 of the Act of September 26, 1914, as amended (15 U. S. C. A. § 45), under which cease and desist orders are issued by the Federal Trade Commission, originally provided that the Commission could restrain "unfair methods of competition." The amendment of March 21, 1938 (52 Stat. 11) added "unfair or deceptive acts or practices". It takes little argument to demonstrate that this language,—especially in the field of advertising or labeling in which the cases cited by petitioner fall,—grants the administrator much wider discretion than do the terms "false or fraudulent pretenses, representations, or promises" which form the basis for the exercise of jurisdiction by the Postmaster General under the mail fraud statutes.

The Food and Drug laws are even more strikingly different from the postal fraud statutes, especially since they have been changed from time to time to reflect changing Congressional intent in the light of court decisions, whereas the postal fraud statutes here involved have not been changed in any respect material to the present case since their passage in 1872.

Section 8 of the Act of June 30, 1906 (34 Stat. 771, 21 U. S. C. A. § 9) provided, *inter alia*, that the term "misbranding" should apply to all drugs or articles of food, the package or label of which bears any statement regarding such article, or the ingredients or substances contained therein, "which shall be false or misleading in any particular", and then went on to provide that a drug should be deemed to be misbranded if it was an imitation of another article or if the package failed to bear a statement of the quantity or proportion of certain named ingredients (21 U. S. C. A. § 10, par. 1 and 2).

In **United States v. Johnson**, 221 U. S. 488 (1911), this Court held that the foregoing provisions were aimed not

at all false or misleading statements in connection with drugs but only at such as determine the identity of the drug, possibly including its strength, quality and purity. Accordingly, statements as to the effectiveness of a remedy to cure cancer were held not within the proscription of the Act.

In 1912, the Act was amended (Act of Aug. 23, 1912, 37 Stat. 416), to add as a ground for finding that a drug was misbranded the condition that "its package or label shall bear or contain any statement . . . regarding the curative or therapeutic effect of such article . . . which is false and fraudulent."

Thereafter, in **Seven Cases of Eckman's Alternative v. United States of America**, 239 U. S. 510 (1916), cited in the Petition at page 19, this Court sustained a libel under the amendment of 1912 on the ground of false statements as to the curative effects of a drug. However, the Court confirmed the fact that by use of the words "false and fraudulent", "Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners", and that an "intent to deceive . . . must be established" (p. 517). In that case, the Court found that the allegations of the libel sufficiently satisfied the foregoing requirements since it was averred that the statements as to actual and future cures were contrary to fact. The Court pointed out that one who represents a drug as a cure "**when he knows it is not**" must be held to have had a fraudulent purpose. Obviously, the latter comment would have no application to a case such as the present one where there has never been any question of the respondent's good faith, nor any averment or finding to the contrary.

Subsequently, in the new Federal Food, Drug, and Cosmetic Act of June 25, 1938 (52 Stat. 1040, 21 U. S. C. A., Sup., §§ 301 et seq.), it has been provided clearly and unequivocally that a drug or device shall be deemed to be misbranded, *inter alia*, "if its labeling is false or mislead-

ing in any particular". There follow many additional instances in which misbranding may be found to exist. Thus the coverage of the Act has been materially extended. See **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410, 420 (C. C. A. 9th, 1948).

Even under the broadened provisions of the latter Act, in presenting cases on libels for misbranding or mislabeling of drugs, the Government in many cases in recent years has actually made elaborate and comprehensive tests of the remedies in question, both in the laboratory and under field conditions.³

And in the cases cited by petitioner involving the Food and Drug laws which have not already been referred to herein, there was either no question of conflicting medical opinion involved (**Goodwin v. United States**, 2 F. (2d) 200 (C. C. A. 6th, 1924), Petition, p. 19), or the defendant questioned the Government's allegations as to only one of many false representations, any one of which was sufficient to sustain the libel (**United States v. One Device, etc.**, 160 F. (2d) 194 (C. C. A. 10th, 1947), Petition, p. 19).

Accordingly, it is clear that none of the cases cited by petitioner in which enforcement of the Food and Drug laws was involved are either pertinent or conflict with the **McAnnulty** decision. In fact, in none of them is any doubt cast upon the validity of the **McAnnulty** Case.

In a larger sense, however, the reason for the difference in the approach of the courts to the Federal Trade Commission cases and also to the Food and Drug Administration cases, as contrasted with the postal fraud cases, lies

3. See, e. g., **United States v. 7 Jugs, Etc., of Dr. Salisbury's Rakos**, 53 F. Supp. 746 (D. Minn. 1944), cited at pages 17 and 19 of the Petition. In this case, the Court said, at page 758, "Under the law as it now exists, before a court is warranted in submitting the false or misleading qualities of an assertion of effectiveness to a jury to decide, it must be satisfied that something more is involved than mere differences of opinion between schools or practitioners." See also **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410 (C. C. A. 9th, 1948), page 19 of Petition. In the latter case, the Court, at page 414, called specific attention to the difference between the meager technical facilities for the determination of medical questions possessed by the Postmaster General and the almost unlimited professional resources available to the agency which carries on investigations in the enforcement of the Federal Food, Drug, and Cosmetic Act.

in the difference in the permissible sanctions or remedies available to the respective administrative agencies. Under the Federal Trade Commission Act, the Commission may issue a cease and desist order against a method, an act, or a practice. Thus, if a person advertises his product in a manner deemed by the Federal Trade Commission to be unfair or deceptive, the Commission will order him to cease advertising in that manner. Normally, the order will refer specifically to certain words or phrases in the advertisement which the advertiser is required to excise. If the Court of Appeals, under the statutory review procedure provided in the Act, enforces the order of the Commission, the offender is rarely, if ever, put out of business. He need only conform his advertising with the order, and he is then generally free to continue to transact business. See **Irwin v. Federal Trade Commission**, 143 F. (2d) 316 (C. C. A. 8th, 1944).

In cases arising under the Food and Drug laws, the Government normally proceeds by a libel in a federal court to seize the offending product or device. There the court action is the primary action and not merely a review of an administrative decision. The defendant is protected by the general rule requiring a decision on the preponderance of the evidence, and also by his right to a trial by jury.

In fraud order cases, however, not only is the order issued upon the authority of a single administrative official and upon the recommendation of a subordinate in his department, but, more importantly, the order, if enforced, necessarily puts the offender out of business. It is difficult to conceive of the modern business that can exist without the use of the mails. Even if it could, it would have little good will left when its regular mail customers or correspondents of any kind received from the Post Office the letter which they had addressed to that business with the word "Fraudulent" emblazoned on the envelope.

Thus we return once more to **American School of Magnetic Healing v. McAnnulty**, *supra*. All of petitioner's efforts in both courts below to get around the effect of that

decision have been of no avail. We have shown why. The **McAnnulty** decision clearly covers the facts of the present case, and no other decision cited by petitioner here or below does so. The principle of the **McAnnulty** decision, as applied by the Court of Appeals, is a salutary restriction upon the unparalleled administrative power which the Postmaster General has sought to exercise in this case.

It is obvious, from a mere reading of a few of the Federal Trade Commission and Food and Drug Administration decisions in the field of medical remedies, that those agencies have not been and will not be retarded in their enforcement programs by the **McAnnulty** Case or by the decision of the Court of Appeals in this case. If the Postmaster General is retarded by either decision, it is only in a field which he has been forbidden to occupy since 1902, with the apparent sanction of the Congress, which, while broadening the scope of the enforcement powers of Governmental agencies under other statutes encompassing fraudulent or misleading medical remedies, has done nothing to widen the scope of the mail fraud statutes since 1872.

CONCLUSION.

No possible basis for certiorari exists here and none has been presented. The decision of the court below is clearly correct and no conflict of decisions is presented. It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX.

REVISED STATUTES § 3929, AS AMENDED, 39 U. S. C. A. § 259.

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

REVISED STATUTES § 4041, AS AMENDED
39 U. S. C. A. § 732.

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way.

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 31.

31

LOUIS A. REILLY, as Postmaster of the City of Newark, in
the County of Essex and State of New Jersey,

Petitioner,

v.

JOSEPH J. PINKUS, Trading as American Health Aids
Company, Also Known as Energy Food Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit.

BRIEF FOR RESPONDENT.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 31.

LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF NEWARK,
IN THE COUNTY OF ESSEX AND STATE OF NEW JERSEY,
Petitioner,

v.

JOSEPH J. PINKUS, TRADING AS AMERICAN HEALTH AIDS
COMPANY, ALSO KNOWN AS ENERGY FOOD CENTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey (R. 59-62) is reported at 71 F. Supp. 993. The opinion of the United States Court of Appeals for the Third Circuit (R. 68-74) is reported at 170 F. (2d) 786.

JURISDICTION.

The judgment of the Court of Appeals was entered October 25, 1948 (R. 76). The Petition for a Writ of Certiorari was filed February 21, 1949, and was granted May 16, 1949 (R. II 228). The jurisdiction of this Court was invoked under Title 28, United States Code, Sec. 1254 (1).

QUESTIONS PRESENTED.

Whether the court below properly held that the Postmaster General had no power to issue a fraud order based upon his opinion that a medical remedy sold by respondent was totally ineffective, where there was difference of opinion as to the effectiveness of the medical remedy.

Whether the hearing officer of the Post Office Department erred in excluding cross-examination of the Government's medical experts by reference to standard medical works where the experts based their opinions partly on text authorities, and in excluding from evidence excerpts of these standard medical works even for the limited purpose of showing the existence of a conflict of opinion as to the effectiveness of respondent's remedy.

STATUTES INVOLVED.

The provisions of Revised Statutes, Sec. 3929, as amended, 39 U. S. C. Sec. 259 (1946), and Revised Statutes, Sec. 4041, as amended, 39 U. S. C. Sec. 732 (1946), are set forth in the appendix, *infra*, pages 57 to 58.

STATEMENT

Since approximately 1939, respondent had been engaged in the business of operating a health food store in Newark, New Jersey, and like thousands of such stores, sold kelp to customers who asked for it (R. II 125-126).¹ He had an analysis made of kelp, and also analyzed the substance himself while taking a course in advanced organic chemistry at Montclair State Teachers College (R. II 127). At the same school, he took a course in the chemistry of foods (R. II 135). He also did experimental work in the subject at the Kirksville School of Osteopathy in Missouri (R. II 132).

1. References to Volume II of the Transcript of the Record will be indicated by "R. II".

Respondent discussed the value of kelp in association with a recommended diet or menu with various physicians (R. II 128), and conducted a considerable amount of personal research on the relationship of kelp to obesity (R. II 129-130).

Respondent is a college graduate, and in addition, holds the degree of Master of Arts (R. II 137).

Before marketing his product in connection with a weight-reduction plan, respondent obtained letters from various doctors certifying to the effect of the product (R. II 141-142). Based on all the information and knowledge he had acquired, respondent then formulated his reducing plan. His plan consists of daily taking a half teaspoonful of Kelp-I-Dine, which is actually kelp, and cutting down on food consumption. For the latter purpose, a suggested diet is included with the package of kelp when it is sent to a customer. In addition, an unqualified money-back guarantee is extended to anyone who finds that Kelp-I-Dine does not help him lose weight (R. 16).

Before putting his product on the market, respondent sent a sample of Kelp-I-Dine to the War Production Board for classification (R. II 142). After Kelp-I-Dine was on the market, he sent the Federal Trade Commission a copy of a radio advertising script in an effort to determine the propriety of his advertising (R. II 145). Later the Food and Drug Administration suggested a small change in his label, to which he immediately agreed (R. II 145).

Since marketing his product, respondent has received thousands of letters from users of Kelp-I-Dine, a great many of whom said that their doctors had approved (R. II 152-153).

The Government placed in evidence examples of advertising inserted by respondent in various magazines, the

substance of which is summarized in a Memorandum prepared by a Solicitor of the Post Office Department for the Postmaster General (R. 16-21), and also circulars sent out in response to test inquiries, and various radio scripts which contained much the same type of statements as were contained in the advertisements (R. II 26-27, 30-35).

A chemist employed in the Food and Drug Administration testified that Kelp-I-Dine was kelp and contained four-tenths of a milligram of iodine in each half teaspoonful (R. II 36).²

The remaining proof submitted by the Government consisted of the testimony of two physicians, one a physician in the Municipal Hospital in Washington who was also a professor of medicine, and the other a doctor employed by the Food and Drug Administration. Neither of them had ever made any test of Kelp-I-Dine or kelp. Their testimony was based exclusively upon their general information and upon the statement as to the content of Kelp-I-Dine already placed in evidence (R. II 63-64, 99, 103, 121).

In substance, these physicians testified that kelp was valueless in the treatment of obesity, although Dr. Roberts, the first expert for the Government, did admit that iodine which is contained in kelp would have some effect on obesity in certain cases (R. II 82), whereas Dr. Norris, the Food and Drug Administration physician, while recognizing the iodine content of kelp (R. II 99), denied that it would have any reducing effect in any case (R. II 97-98). Dr. Norris admitted, however, that he had seen statements in certain medical books to the effect that kelp was used in the treatment of obesity (R. II 104, 111). The Government's medical experts also differed from each other as to

2. It is interesting to note that the respondent, upon whose alleged fraud the Government's action was based, testified, after hearing the Government chemist's testimony, that the Government's analysis was in error and that a half teaspoonful of kelp contained only three-tenths of a milligram of iodine (R. II 127, 173).

the caloric content of the diet portion of respondent's reducing plan. Dr. Roberts thought the recommended diet contained between eleven hundred and twelve hundred calories (R. II 74), whereas Dr. Norris was of the opinion that the diet would afford eight hundred or nine hundred to one thousand calories (R. II 90). The difference between these estimates is more than twenty per cent.

Both physicians agreed that by following the recommended diet contained in respondent's reducing plan, a person could lose a certain amount of weight, and possibly as much as three pounds a week or more (R. II 59, 78, 121). However, these experts testified that in certain cases such a loss of weight might be harmful,—where the person involved had one of a number of chronic diseases such as heart disease, diabetes, tuberculosis, etc. (R. II 75, 118). But it was expressly stated that kelp itself was harmless (R. II 117, 119). And Dr. Roberts testified that the recommended diet might be helpful to a patient free from disease. However, Dr. Roberts felt that **any** person desiring to reduce should be observed "rather closely" by a physician (R. II 76-77).

In the course of cross-examination of Dr. Roberts, counsel for respondent attempted to read to him quotations from standard medical works regarding the use and efficacy of kelp in the treatment of obesity. The Assistant Solicitor of the Post Office Department who sat as hearing officer recognized that there were "two lines of authority" as to the permissibility of this form of cross-examination of an expert witness who has testified from general knowledge and information. However, the stricter rule, prohibiting this form of cross-examination, was followed by the courts of the state in which the assistant solicitor had practised law for 25 years, and, as he said, "I just can't get away from

3. Wherever bold-face type appears in this brief the emphasis is ours.

it" (R. II 66). Accordingly, this form of cross-examination was uniformly excluded as to both of the Government's medical witnesses (R. 65-66, 105-107), even though the books themselves were identified by a Government witness as the volumes which counsel for respondent named and described and there was no question of their authenticity (R. II 108, 109, 110).

Efforts of respondent to offer these books as part of his own case met with a similar ruling (R. II 113-114), even when the statements in these books were adopted by respondent's medical witness as his own (R. II 170-173, 175, 181, 182).

The excerpts from the books which have been referred to are set forth in Volume I of the Record at pages 36 to 42. They include medical works published as recently as 1944 (the hearings having taken place in January, 1945). These works contained statements, *inter alia*, that fucus (another name for kelp) "is used . . . as a cure for obesity" (The **American Illustrated Medical Dictionary** by W. A. N. Dorland, 20th ed., Saunders, 1944, p. 588), and that it "is used . . . in obesity, under the names of anti-fat" (**Gould's Medical Dictionary**, edited by R. J. E. Scott, 3rd ed., Blakiston, 1931, page 533) (R. 36-38).

At the conclusion of the respondent's own testimony, counsel for respondent described the difficulty he was having in getting a medical doctor to come to Washington and testify in January, 1945,—a critical period during the war. He stated that, because of the shortage of doctors, the doctors he had hoped to present could not come to Washington to testify. These included Dr. Charles V. Craster, the Health Officer of the City of Newark, N. J., who had endorsed the product. He had tried to contact doctors in Washington, where the hearings were being conducted, and had even procured names of doctors at random from the Medical Society in Washington, but they all stated that in view of the acute shortage of doctors, they felt it unfair to

take the time necessary to analyze the product, and to prepare, and appear to testify (R. II 162-163).

He therefore requested a continuance for the purpose of presenting medical testimony. The Government's counsel objected. The assistant solicitor who was hearing the case then ruled that since the memorandum of charges was dated November 23, 1944,—six or seven weeks prior to the date of the hearing in question,—he would conclude the hearing Saturday, January 13, 1945. This ruling was made in the late afternoon of Thursday, January 11, 1945 (R. II 165).

On January 13, 1945, respondent appeared with a doctor from Newark, New Jersey, but without counsel. He stated that his attorney (since deceased) had gone to a doctor the previous day and had been ordered to bed because of a blood pressure of 260, but that he had written out questions for respondent himself to present to the medical witness (R. II 168-169). This was deemed necessary by respondent in view of the hearing officer's prior ruling that the hearings would be terminated on that day. The hearing proceeded with respondent representing himself, questioning his own witness, attempting to make objections to cross-examination, and even being faced with the necessity of answering extensive legal argument by Government counsel on the admissibility of evidence, which he, of course, did not even attempt to do (R. II 171-173).

The physician who testified on behalf of respondent was Dr. Assadour Melkon Altounian. He was educated in Syria, and was graduated from medical school there in 1906 (R. II 183). He took some postgraduate work in London (R. II 184). He had been in the general practise of medicine in this country for 24 years (R. II 169), and was an admitting physician of the City Hospital of Newark, New Jersey (R. II 169). It is obvious even from the printed transcript of his testimony that he was having considerable difficulty with the English language (see, e. g., R. II 201).

In general, Dr. Altounian's testimony supported the representations made in respondent's advertising as to the effectiveness of the plan in the treatment of obesity (R. II 169-182), although he testified that a reduction of weight might be harmful in certain cases, such as where a person has heart trouble (R. II 184-185).

While respondent's medical witness stated on cross-examination (as set forth in petitioner's brief at page 11) that he based his testimony as to the loss of weight that could be achieved from following respondent's plan on a report by the Director of the Board of Health of Newark, New Jersey (R. II 207), he testified on redirect examination that after himself examining the kelp and the recommended diet in respondent's plan, he personally agreed with the aforementioned report (R. II 212).

Following the hearings, the Solicitor of the Post Office Department (not the assistant solicitor who sat as hearing officer) filed a Memorandum for the Postmaster General, dated May 3, 1945, in which he stated that kelp was valueless in the treatment of obesity and recommended issuance of a fraud order (R. 14-26). On May 7, 1945, the Postmaster General issued an order forbidding the Postmaster of Newark, New Jersey, to pay any postal money order drawn to the order of American Health Aids Company and Energy Food Center (respondent's trade names) and their officers and agents as such at Newark, New Jersey, directing him to inform the remitter of any such postal money order that payment was forbidden and that the amount would be returned on request, and instructing him to return all letters and other mail matter addressed to the above firms and persons to the senders with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly stamped on the outside of the letters (R. 12-13).⁴

4. Subsequent to the appeal from the judgment of the District Court, the fraud order was revoked by the Postmaster General insofar as it applied to the Energy Food Center and its officers and agents as such (R. 70).

On July 23, 1945, enforcement of the fraud order was preliminarily enjoined by the United States District Court for the District of New Jersey until further order of the Court (R. 51-54), principally on the ground that "there was insufficient evidence from which the Postmaster General could find actual fraud in fact on the part of the plaintiff" (R. 50).

On June 5, 1947, after the Government had filed an answer, the District Court denied the Government's motion for summary judgment (R. 62), and on June 16, 1947, entered summary judgment in favor of respondent here (R. 63-64).

On appeal, the judgment of the District Court was affirmed on October 25, 1948 (R. 68-74), with one judge dissenting (R. 74-76). The majority of the Court of Appeals for the Third Circuit based their affirmance "upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General" (R. 73). The Court reserved the question of whether the efficacy of respondent's plan was not subject to proof as an ordinary fact, but ruled that the evidence upon which the fraud order was issued was not factual but was "solely in the nature of opinion evidence" (R. 73).

The dissenting judge was "not prepared to say that the conclusion of the Postmaster General is patently erroneous, nor that the basis of his conclusion is the type of 'opinion evidence' which was rejected in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902)" (R. 75).

Even the dissenting judge seemed to have some doubt, however, "whether or not it might have been preferable that the *modus operandi* of appellee [respondent] be tested through some other machinery such as the Federal Trade Commission" (R. 76). He also stated that in view of the holding of the majority of the Court, "I need not express my opinion whether the scope of cross-examination permitted appellee at the administrative hearing was so unduly limited as to warrant remand for a rehearing" (R. 76).

Argument.

I

**THE POSTMASTER GENERAL HAS NO POWER TO
ISSUE A FRAUD ORDER BASED SOLELY UPON
HIS OPINION THAT A MEDICAL REMEDY IS
TOTALLY INEFFECTIVE.**

**A. American School of Magnetic Healing v. McAnnulty
Governs This Case.**

This case is governed by **American School of Magnetic Healing v. McAnnulty**, 187 U. S. 94 (1902). Both courts below so held without equivocation, and the bulk of petitioner's brief consists of an effort to establish that that decision is inapplicable. However, an analysis of the opinion of this Court in the **McAnnulty** Case will, we are certain, sustain the view of both courts below as to its effect.

In the **McAnnulty** Case, a fraud order was issued against the company and its principal officers on the ground that they were engaged in a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses. Plaintiffs brought a bill for an injunction against enforcement of the fraud order, in which they averred that their business was (187 U. S. at 96) "founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof," and that the human race possesses the innate power to largely control and remedy its ills and from this source emanates the plaintiffs' treatment.

There were other allegations in the complaint, all of which were admitted by a demurrer filed by the defendant, a local postmaster. However, in reversing the lower court and instructing it to grant a temporary injunction with leave to the defendant to answer, Mr. Justice Peckham

referred only to this one admission, that is, that the plaintiffs' business was founded on certain principles (page 103).

This Court stated that there was no doubt that the mind exerted some influence upon the physical condition of the body and that it was claimed by some that nature could heal without recourse to medicine. The Court admitted that the extent to which these claims could be borne out by actual experience might be a matter of opinion, but that no one could say accurately to what extent mental condition affects the body. Accordingly, the Court held that no one could say it was a fraud for one person to contend that the mind has an effect upon the body greater than even a vast majority of intelligent people might be willing to admit or believe. The Court concluded (page 104):

“ * * * There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. * * * ”

The Court went on to give examples of other medical fields in which there were differences of opinion as to the effectiveness of a particular remedy, and at page 105 generalized its view on this subject as follows:

“ * * * As the effectiveness of almost any particular method of treatment of disease is, to a more or

less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. * * *

And at page 107, the Court stated:

"It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. * * * The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes." *

In the second portion of its opinion, this Court demonstrated that the general principle of the inviolability of administrative findings of fact did not apply, because here the Postmaster General had committed an error of law as to his power under the applicable statute.

5. This view was adopted in determining that representations made by a company in a trademark case were not fraudulent so as to bar the plaintiff from the aid of an equity court in **Moxie Nerve Food Co. of New England v. Holland**, 141 Fed. 202 (C. C. D. R. I. 1905); *cf.* **Hurley v. Dolan**, 297 Fed. 825 (C. C. A. 1st, 1924), where enforcement of fraud order which had been issued against a seller of lucky stones was restrained.

B. Petitioner's Efforts to Circumvent the Rule of the McAnnulty Case Are Without Foundation.

The petitioner does not directly attack the rule of the **McAnnulty** decision. Instead, he seeks to circumvent it on three grounds, each of which is completely without foundation. We shall consider them separately.

1. The petitioner points out that the bill in the **McAnnulty** Case included an averment that no fraud, deceit, deception or misrepresentation was ever practised by the plaintiffs, and since such facts were admitted by the Government's demurrer, "that obviously is an adequate basis for setting aside a fraud order in the absence of a record of hearing" (petitioner's brief, page 25).

However, as we have shown, the Court in its opinion does not refer to the allegation of the lack of fraud on the part of the plaintiffs. If it had, and had accepted that allegation as an admitted fact, it certainly would not have gone on for over eight pages to enunciate the important principles, some of which we have quoted above. Obviously, the Court did not proceed upon the theory that the Government by its demurrer had admitted plaintiffs were guilty of no fraud.

2. The petitioner states that this Court in 1902 "assumed" that the effectiveness of treating disease through control of the mind was a matter that could not be proved or disproved as a fact. (petitioner's brief, pages 25-26).

If by innuendo the petitioner is implying that in 1949, we have arrived at that Utopia in the development of medical science where the effectiveness of a medical remedy is no longer a matter of doubt on which the opinion of qualified persons may differ, it has certainly not even endeavored to establish that status as a fact. Nor could it be so established.

The newspapers almost daily tell us of medical remedies as to which various schools of thought exist. Indeed, the very subject of discussion in the **McAnnulty** Case is by no means resolved beyond all doubt. The study of psychiatry, hypnosis, and related fields of medical thought are still in a stage of conflict. And who of us has not had qualified physicians differ in their opinions as to the proper remedy for the most common of human ailments?

No, petitioner cannot impute antiquity to the Court's views in the **McAnnulty** Case, and by so doing prove its views wrong. Rather is it true that as medical science progresses, doctors realize how much more doubt exists concerning remedies which in the past were considered infallible. And as to new remedies, it goes without saying that even greater doubt exists, especially in the experimental stages of their development. If medical opinion alone could support a fraud order, the Postmaster General would have had no trouble twenty years ago in justifying such an order against the advocates of the Sister Kenny method of treating those afflicted by infantile paralysis. And even today, he could undoubtedly find "substantial evidence", if opinions alone were considered adequate for this purpose, on which to base a "finding" that that method is ineffective. Even more appropriately could the analogy be extended to divergent views regarding sulfa drugs and penicillin, despite their very wide usage.⁶ And even in the case of as common a home remedy as aspirin, recent experiments have indicated a possible effect on the blood-clotting properties of the blood and a dispute of medical opinion has arisen as to the proper use of this universal drug.

The Record in the present case contains a good, though unintended, illustration of the same point. Dr.

6. After nine years of wide usage, acceptance of sulfa-thiazole was withdrawn by the American Medical Association because it was found to have caused too many bad reactions. **Time**, October 3, 1949, page 52.

Roberts, one of the Government's two medical witnesses, had expressed some rather positive views regarding iodine and its effect on loss of weight. Then, in connection with an item in respondent's advertising, Dr. Roberts was asked if he knew whether or not the Food and Drug Administration had established a person's normal daily minimum requirement of iodine. He replied, in part (R. II 83):

"I don't know whether they have set up a statement or an opinion on that. It is a problem of great academic interest. By that I mean **there is a great deal of argument on that point as to the form and amount of iodine which is necessary** under various conditions. * * *

Thus, from the lips of the Government's own medical expert comes an admission of unsettled difference of opinion regarding a drug which is very old and well known, which is the main ingredient contained in kelp, and which forms the principal basis for the respondent's claim of kelp's efficacy in treating obesity!

And finally, the hearing officer himself stated, in the course of the proceeding, that there might be doctors " * * * who might disagree with a fixed scientific fact" and that even the Government's medical expert would not know "whether **all** doctors might approve or disapprove the treatment" encompassed by respondent's plan (R. II 97).

The Court in the **McAnnulty** Case spoke with a wisdom which has more than withstood the passage of time, when it stated (187 U. S. at 105):

" * * * As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. * * *

It was for the foregoing reason, supported by pointed illustrations, that the Court concluded (page 106):

"Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the **Postmaster General might think to be false opinions**, but only cases of **actual fraud in fact, in regard to which opinion formed no basis.**"

That reasoning is at least as valid today as it was in 1902, and the Government, in endeavoring **by indirection** to argue invalidity by reason of age (and not very old age at that), indicates by its own timidity the insupportability of its argument.

3. Petitioner states that the Court treated the **McAnnulty** Case "as one in which there were two conflicting schools of honest medical opinion, neither of which could be proved false in fact" (petitioner's brief, page 26). At this point, and later in its brief (pages 42-45), petitioner argues that there was in the present case "**no conflict of opinion** on the basic propositions which proved the fraud."

It seems inconceivable that this assertion could be made by anyone who has read the Record in this case. As a matter of fact, to demonstrate that the issuance of a fraud order in this case was based on opinion evidence, and that there was a real difference of opinion, we need hardly look further than the Solicitor's Memorandum to the Postmaster General upon the basis of which the latter issued the fraud order against respondent. In that Memorandum, it is clearly stated that "The findings of fact made herein are based **only** upon the medical testimony of the expert witnesses appearing on behalf of both the Government and the respondent" (R. 25). As we have shown, the pertinent testimony of these medical witnesses consisted of their **opinions** as to the therapeutic value of respondent's treatment.

Although the Solicitor in his Memorandum discussed various phases of the testimony, his ultimate finding in sup-

port of his recommendation for the issuance of a fraud order was "that kelp [the substance sold by respondent as "Kelp-I-Dine"] is valueless in the treatment of obesity" (R. 23), and that although a purchaser is led to believe by respondent's advertising that his product is valuable for the treatment of obesity, "the medical testimony in this case proves that it is valueless for such purpose" (R. 25). The Solicitor, although he paid little attention to the respondent's medical expert, did mention his testimony that kelp, because of its iodine content, was an "antifat for reducing" and "could be used in the treatment of obesity" (R. 23). The Solicitor admitted that the suggested diet forming part of respondent's advertised reducing plan would effectuate a reduction in weight, but stated that the diet was rigid and severe, and that the reduction would not be accomplished without experiencing hunger and the discomforts and strain thereof (R. 23-25).

Finally, the Solicitor stated that one of the expert medical witnesses for the Government conceded on cross-examination that he had seen statements "in medical dictionaries and other books that kelp was at one time used as a treatment for obesity or was reputed to have some value in the treatment thereof" (R. 25-26).

Thus the Solicitor's Memorandum itself,—however grudgingly,—shows that there was a conflict of opinion as to the effectiveness of respondent's remedy. The testimony clearly demonstrates the conflict of opinion. There was no contradiction in any way whatever of the facts that the respondent's remedy was backed by years of study and experimentation, that various doctors had certified to its effectiveness, and that thousands of users had written in to endorse the remedy, many to say that their doctors approved.

And the Record is just as clear that the Postmaster General's ultimate "finding of fact" in support of the issuance of a fraud order, namely, that respondent's remedy

was totally ineffective to accomplish the result for which it was advertised and sold, was merely the **opinion** of the Postmaster General based upon the somewhat divergent **opinions** of the two medical experts appearing for the Post Office Department.

1. HEARING OFFICER ERRED IN EXCLUDING REFERENCE TO STANDARD MEDICAL WORKS IN CROSS-EXAMINATION OF GOVERNMENT'S MEDICAL WITNESSES.

Assuming, *arguendo*, that there was some doubt of the existence in the Record of a conflict of opinion as to the effectiveness of kelp in the treatment of obesity, that doubt would certainly be resolved if consideration were given to the text authorities which respondent sought, in every way he could think of, to introduce into the Record in this case. We have summarized some of the pertinent excerpts from these texts in our Statement at page 6 above. Obviously, they establish at the very least that kelp or fucus (which respondent called "Kelp-I-Dine") has been used and, as late as 1944 (the hearings having been held in January, 1945) was still being used medically in the treatment of obesity.

In refusing to permit respondent's counsel to cross-examine the Government's medical experts by asking them whether they had seen statements in a number of admittedly well-known and commonly used (R. II 104, 109, 110) medical dictionaries and other books, contradicting their testimony, the hearing officer stated that he felt constrained to follow the rule in effect in the state in which he had practised law (R. II 66). Later, he purported to rely on the principle that where the testimony of an expert witness is based **exclusively** on his general knowledge and **not at all** on written authorities, he may not be cross-examined by reference to such authorities. To support his view, the hearing officer stated that the medical expert in question had not relied upon any **specific** treatises or texts (R. II 112).

In the first place, it should be pointed out that, as the hearing officer admittedly knew (R. II 65), the principle of law upon which he based his rulings is highly controverted and that approximately half the jurisdictions in which the question has arisen have ruled that cross-examination from scientific treatises is permissible even though the witness has not stated that he is testifying from his reading of the authorities.⁷

Furthermore, it is doubtful whether it can ever be said that an expert witness,—particularly a medical witness,—is not to some extent relying upon the teaching of others in reaching his conclusions. **Laird v. Boston & M. R. R.**, 80 N. H. 377, 117 Atl. 591 (1922); *cf.* 6 **Wigmore, Evidence** (3d ed., 1940) 5. Consequently, predicating the allowance or refusal of cross-examination upon whether the witness **states** that he is relying upon the authorities harks of a mechanical jurisprudence which this Court should not tolerate. The important fact is that the treatise is not offered as evidence of the truth of the statements contained therein; it is offered merely to contradict the witness.

Accordingly, in view of the general practice in administrative proceedings, relaxing strict rules of evidence to permit the broadest possible inquiry into the question under investigation,* the action of the hearing officer in resolving this disputed point against the respondent, and **against the**

7. *E. g.*, **Yarn v. Ft. Dodge, D. M. & S. R. Co.**, 31 W. (2d) 717 (C. C. A. 8th, 1929), *cert. denied*, 280 U. S. 568 (1929); **Kern v. Pullen**, 138 Ore. 222, 6 P. (2d) 224 (1931). Cases involving this question are collected in a Note, 82 A. L. R. 440, 448 (1933).

8. See **Rep. Att'y Gen. Comm. Ad. Proc.** 70 (1941). See also, section 7(c) of the Administrative Procedure Act of 1946, 60 Stat. 241, 5 U. S. C. Sec. 1006 (c); Sen. Doc. No. 248, 79th Cong. 2d Sess. 320 *et seq.* (1946). Even the regulations of the Post Office Department sanction the adoption of a liberal view. 39 Code Fed. Regs. Sec. 51.16 (Supp. 1946).

admissibility of helpful, pertinent evidence, appears unduly harsh,—reflecting a philosophy that the relaxation of strict rules of evidence in administrative proceedings is to be exercised only in favor of the Government."

However, we submit that even if the hearing officer was justified in adopting the stricter of the foregoing divergent views, he was completely in error in relying upon that rule in this case, because here the testimony of one of the medical experts for the Government was admittedly based on textbooks and general medical authorities.

Dr. Norris testified that he had read "every one of them dealing with obesity—all the textbooks" (R. II 98). When pressed to quote or refer specifically to one of the authorities upon which he was relying, Dr. Norris (an employe of the Food and Drug Administration since 1929) stated, "No, I am not stating any definite textbook. **My statements here are made upon my reading of all the textbooks and the recent articles** and a conference with experts and specialists in treatment of obesity . . ." (R. II 103). The witness further testified, "I can negatively say that **I know of no modern reliable book which advocates the use of iodine . . .** as a practical or effective reducing agent or even as an effective adjunct in connection with reducing diets" (R. II 103). The witness then stated that he had seen statements in dictionaries to indicate that seaweed or kelp had been used as a treatment or was reputed to have some value in the treatment of obesity (R. II 104, 111). However, he testified that no reputable textbook took this view (R. II 105).

9. It seems particularly significant that early in the hearings, when respondent's counsel objected to testimony **of the Government** on the basis of rules of evidence, the hearing officer overruled the objections because of the principle that evidentiary rules are not strictly applied in administrative proceedings (R. II 11, 13-14).

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Where, as here, an expert relies, at least in part, upon authorities in the field, it is fully recognized that he may be cross-examined as to the authorities generally, and may be asked if he agrees with extracts from certain books which are read to him. 6 **Wigmore, Evidence** Sec. 1700 (b). The cases are collected in Note, 82 A. L. R. 440, 442 (1933). It is immaterial that the expert revealed for the first time on cross-examination that his opinion was based upon something he had read, rather than exclusively on his personal experience. **Wilcox v. International Harvester Co. of America**, 278 Ill. 465, 116 N. E. 151 (1917).

We submit that even applying strict rules of evidence in an administrative proceeding, as the hearing officer in this case did, under any system of evidentiary law, administrative or judicial, plaintiff should clearly have been permitted to impeach the Government's medical expert, who **admitted** his partial reliance upon written authorities, by referring him to contradictory statements in recognized medical works.

2. HEARING OFFICER ERRED IN EXCLUDING EXCERPTS FROM STANDARD MEDICAL WORKS/AS EVIDENCE THAT THERE WAS A CONFLICT OF OPINION AS TO THE EFFECTIVENESS OF RESPONDENT'S REMEDY.

Equally erroneous was the hearing officer's refusal to admit these textbooks into evidence as part of respondent's case, both preliminarily (R. II 114), and after the statements had been adopted as the view of respondent's medical witness (R. II 171-173,¹⁰ 175, 181, 182). The statements in

10. At R. II 171, the hearing officer ruled that excerpts from a textbook were admissible after respondent's medical witness approved the views expressed therein. Counsel for petitioner then launched into a lengthy legal argument, citing text authority, in opposition to this ruling. Respondent having been compelled to proceed without counsel despite the fact that the absence of his attorney was due to

the textbooks and dictionaries, as we have shown, unquestionably demonstrated the existence of medical opinion that kelp was effective in treating obesity. Assuming that that opinion was subject to attack, or even could not be supported, the texts proved the **existence** of the opinion. And, for the purpose of establishing the existence of the opinion, the books were admissible, since for this purpose they could in no sense be regarded as hearsay evidence. Even if inadmissible to establish that kelp was effective in treating obesity, they were certainly admissible to establish that the authors of the books were of the opinion, or reflected the opinion, that it was effective in such cases. On this point, there is **no** conflict of authority. **The Philadelphia and Trenton Railroad Co. v. Stimpson**, 14 Pet. *448, 461-462 (U. S. 1840); 6 **Wigmore, Evidence** Sec. 1770 (5).

Even regarding the textbooks and dictionaries as hearsay evidence, there is highly respectable authority for the proposition that they should be admissible for all purposes as an exception to the hearsay rule. Professor Wigmore so stated as far back as 1892, disagreeing with the prevailing rule. **Scientific Books in Evidence**, 26 Am. L. Rev. 390; see also 6 **Wigmore, Evidence** Secs. 1690, 1691. The courts of at least two states appear to follow this enlightened view. **Lambert v. State**, 234 Ala. 155, 174 So. 298 (1937); **Bowman v. Woods**, 1 Greene 441 (Iowa, 1848); cf. **Yarn v. Ft. Dodge, D. M. & S. R. Co.**, 31 F. (2d) 717, 721 (C. C. A. 8th, 1929), *cert. denied*, 280 U. S. 568 (1929). In addition, a number of states have adopted the rule of admissibility by statute. See 6 **Wigmore, Evidence** Sec. 1693, for a list of statutes.

sudden and serious illness (R. II 168), the hearing officer called upon the respondent for authority to support admissibility. Respondent was, of course, unqualified to present legal authority, and the hearing officer then reversed his ruling and rejected the proffered evidence (R. II 173).

And in the American Law Institute's **Model Code of Evidence** (1942), the more liberal rule is unequivocally adopted. Rule 529 provides:

"A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject."

The limited amount of comment on this section has all been favorable. See **McCormick, Cases on Evidence** 976 (2d ed., 1948); Long, **The Code of Evidence Formulated by the American Law Institute**, 23 Mich. St. Bar J. 3, 15 (1944) ("sensible and certain").

Certainly a liberal rule of evidence which has been sponsored by eminent legal scholars for adoption even in judicial proceedings, and which has actually been adopted in a number of states, should have been followed in an **administrative** proceeding culminating in such a Governmental action as a postal fraud order. This is especially true in view of the recent trend toward resolving all doubts in favor of the admissibility of evidence. See **Fed. R. Civ. P.**, 43 (a).

Accordingly, we urge that the textbook authorities in question (R. 36-42) either be considered as part of the evidence in this case, or at the very least that the case be returned to the Post Office Department with instructions to conduct a rehearing in which respondent is permitted to use the textbooks both in cross-examining petitioner's medical witnesses and as substantive proof of the existence of conflicting medical opinion as to the efficacy of kelp in obesity cases.¹¹

11. In the event of such a rehearing, respondent, if permitted, could undoubtedly supplement the medical testi-

C. Petitioner Failed to Adduce Factual Evidence in Support of the Fraud Order.

Even disregarding the medical works to which we have been referring, there is no doubt in the Record, as we have demonstrated, that the fraud order in this case was issued in reliance solely on opinion evidence, and that there was a clear conflict of opinion as to the efficacy of respondent's remedy.

For these reasons, the Court of Appeals, like the District Court, squarely held that the **McAnnulty** decision governed the disposition of this case. The Court of Appeals stated (R. 73-74):

"We feel constrained to affirm the judgment of the court below upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General. We would not be understood to say that the value of the plaintiff-appellee's plan and product is not subject to proof as an ordinary fact nor that scientific research and tests may not disclose factually and definitely the efficacy of a particular plan or product. We do say that the evidence upon which the Postmaster General acted was not factual evidence but solely in the nature of opinion evidence. If there be ordinary factual evidence of the value of the product and plan here involved it was not placed before the Postmaster General. The proceedings in the Post Office Department do not disclose that any scientific test or research was made with the appellee's product or plan or that the opinions of the medical experts were founded upon the results of any such research or tests. On the contrary, the testi-

mony on which he was forced to rely by the Government's insistence upon a hasty hearing and refusal to accord respondent adequate opportunity to bring medical witnesses to Washington to a hearing held under wartime conditions, when the shortage of doctors was known to everyone. See *supra* pages 6-7.

mony of the medical experts at the hearing in the Post Office Department seems clearly to have been **founded solely upon professional opinion** based upon a general reading of authoritative textbooks and discussions with other members of the medical profession and indicates that **with respect to the efficacy of appellee's product and plan there are two schools of thought**, albeit one may be outmoded and fallacious in the opinion of a majority of the members of the medical profession."

The Court indicated, in the foregoing excerpt from its opinion, that the Post Office Department **might** have been able to prove **factually** that respondent's remedy was valueless for the treatment of obesity. While it might be argued that this view deviates somewhat from the principles enunciated in the **McAnnulty Case** (R. 74), we need not now determine its validity, for there can be no doubt of the complete absence from the Record in this case of any **factual** evidence of the inefficacy of respondent's remedy.

It was obviously because of this absence of any **factual** evidence supporting the Department's contention, that the Solicitor of the Post Office Department, in his Memorandum for the Postmaster General, based his so-called finding of fact solely upon the opinion testimony of the medical witnesses. For there was no attack at all on the **factual**, as distinguished from the opinion, aspects of this case. The good faith of respondent, his long and careful study and investigation of the effect of his remedy, his consultation with practising physicians, his receipt of letters certifying his plan from reputable doctors, including the Health Officer of the City of Newark, his receipt of thousands of unsolicited testimonials from users of the remedy, many of whom said their doctors approved,—none of these **facts** was refuted or even challenged.

And respondent has always been open and cooperative even with the Governmental agencies referred to by the petitioner in his brief (page 42) as being in danger of hav-

ing their action crippled because of this case.¹² He has had contact with the Federal Trade Commission, to whom he referred a radio script for approval, and with the Food and Drug Administration, which approved his labeling after he promptly made the small change which that agency suggested.

As a matter of fact, throughout these proceedings, respondent was always willing,—and repeatedly so indicated,—to conform his advertising to the wishes or recommendations of the Post Office Department (R. II 162, 214). Even before the hearings began, respondent through counsel offered to stipulate “to cease and desist from making the representations contained in your memorandum of charges” (R. II 10). But the response of the Post Office Department was that there was no machinery by which the respondent could be advised as to the proper scope of his advertising, and that “those using the mails do so at their own responsibility and if they violate the law then and only then does the Post Office step in” (R. II 216). The only stipulation into which the Government would enter would necessitate the discontinuance of respondent’s business and the return to the sender of all mail addressed to respondent’s place of business, stamped “Out of Business” (R. II 12).

Thus, so far as **facts** go, respondent’s position in this case is unimpeachable. And beyond those facts, the Post Office Department relied for the issuance of a fraud order solely on the **opinion** of its two medical experts as against that of respondent’s medical expert and of the conceded statements in various medical dictionaries and texts. If **American School of Magnetic Healing v. McAnnulty** means anything at all, it is certainly authority for the proposition that such action by the Postmaster General is not permitted by the statute.

12. There is no support whatever in the Record for such an assertion, nor indeed is there even reference to it in the transcript of testimony.

Both courts below considered the primary issue in the case to be respondent's representations as to the effectiveness of his product and plan in the treatment of obesity, and the "finding" of the Post Office Department as to these representations. The courts' approach reflected the emphasis not only of the Solicitor in his Memorandum to the Postmaster General, but also the emphasis of counsel in the arguments before the courts below.

Now, apparently realizing, though not admitting, that the **McAnnulty** Case squarely governs the present case so far as the evidence and finding on effectiveness of respondent's product and plan are concerned, petitioner has attempted to shift his emphasis away from this point and toward minor issues,—issues which up to now have been accorded little attention in this proceeding because everyone realized that they were minor.

Aside from representations as to the loss in weight that would be achieved by using respondent's product in accordance with his plan, there were only a few specific representations in respondent's advertising that were even considered in the Solicitor's Memorandum to the Postmaster General. The Solicitor's remarks as to these representations could not possibly of themselves form the basis for a fraud order, and the Solicitor nowhere indicated that they entered materially into the ultimate finding of fraud.

Among the representations considered by the Solicitor was the statement in a few of respondent's advertisements that followers of his plan would lose excess weight with "no strain" (R. 18), and a statement in a radio script that one could thus lose weight "quickly, easily" (R. 19). The Solicitor referred to testimony in the Record that if a follower of respondent's plan adhered to the recommended diet included with the kelp sent to the user, he would be hungry, since the diet was rigid and severe. From this testimony, the inference seems to be drawn that the representations quoted above were fraudulent.

As the court below indicated, the severity of the diet recommended by respondent was as much a question of opinion as the inherent value of kelp in treating obesity (R. 72). At best, the statement that the loss of weight would be easy is a mildly puffing remark. Plainly, different individuals following the same diet would do so with varying degrees of ease and comfort. Accordingly, the reference to this portion of respondent's advertising could not be taken seriously as the basis for a fraud order.

Again, the Solicitor referred to testimony in the Record that treatments for obesity should be individualized and prescribed only after scientific diagnosis (R. 24), and that although a follower of respondent's plan might lose as much as three pounds per week, it would not be harmless, particularly if the diet were not scientifically indicated in his particular case (R. 25). In this discussion, the Solicitor was apparently referring to the use of the words "absolutely harmless" and "safe" in respondent's advertising (R. 16, 18).

Here again, there is no evidence of a misrepresentation of fact which could possibly form the basis of a fraud order. In the first place, it is perfectly clear, and all the evidence shows, that kelp is harmless (R. II 117), and it is obvious that none of the foods in the recommended diet accompanying the kelp was at all harmful. What the physicians who testified for the Government said was not that respondent's plan was harmful in itself, but that reduction in weight might be harmful to a particular person under certain circumstances, that is, where the person is suffering from heart disease, diabetes, tuberculosis, etc. (R. II 118).

The distinction is a very important one. Obviously, there is virtually no medical remedy sold over the counter, and probably very few foods (although we do not profess to be experts on the subject) that would not harm some persons under certain conditions and in certain quantities. If the fact that an advertised commodity might be harmful

to some persons under certain conditions were a proper basis for the issuance of a fraud order, we submit that as a matter of common knowledge the Court must conclude that fraud orders could be issued against the best known pharmaceutical and food firms in America, solely on the ground that their advertising represented that their products were harmless.

Now, petitioner stresses particularly the "danger" of respondent's plan,—by which, as we have shown, petitioner actually can refer only to the possible danger of weight-reducing as such. While it may be desirable for all people to consult physicians before undertaking a reducing diet,—just as the same might be said of the self-prescribing of aspirin, bicarbonate of soda, and many other common remedies, all of which are undoubtedly harmful to some persons under certain circumstances,—it is a matter of common knowledge that few people take this precaution. We have been called a nation of dieters. Our newspapers and magazines regularly publish various form of diets. Certainly the Post Office Department does not assert that, as a result, the publishers of most of the reputable periodicals in America are guilty of fraud under the postal fraud statutes!

On the other hand, persons suffering from heart disease, diabetes, tuberculosis and similar serious ailments are usually under the care of physicians. It is doubtful that they would enter upon a reducing program without medical advice. In any event, advertisers are certainly entitled to assume that readers exercise a certain modicum of common sense. Ice cream may be advertised as healthful and nutritional, but the advertiser assumes that diabetics will be advised as to its effect upon them.

As petitioner points out in quoting from a decision of this Court (petitioner's brief, page 21), "'Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds.'" By that standard, no one could allege that re-

spondent's incidental use in its advertising of words like "harmless" and "safe" meant any more to the ordinary mind than that respondent's plan was harmless and safe unless the user were suffering from some serious ailment. In fact, the words "harmless" and "safe" were **unqualifiedly** true as to kelp, and the understood qualification in the case of seriously ill readers applied only to the reducing diet,—as it would to any of the multitude of such diets published regularly throughout the land.

Accordingly, petitioner's shift of emphasis from the Solicitor's primary finding of ineffectiveness to the Solicitor's passing reference to the use of words like "safe" and "harmless" can avail petitioner nothing.

Certainly no court would sustain a fraud order on so flimsy a basis. In any event, whether or not it might be a laudatory aim of the Post Office Department to bar from the privilege of receiving mail anyone selling a product which under any circumstances might be harmful to any person, obviously the postal fraud statutes do not grant the Postmaster General that authority.

In further efforts to avoid the impact of the **McAnnulty** Case and to upset the clear-cut application of that case by both courts below, the Government goes far afield into metaphysical arguments as to the rules of evidence with which it feels the Court of Appeals has tampered, and makes frenzied protests against what it construes as a requirement by the Court of Appeals that human life be endangered by the conducting of experiments with respondent's plan (petitioner's brief, pages 33-42).

Petitioner's discussion concerning what may be termed the side-effects of the opinion of the Court of Appeals on the admissibility of expert testimony, may be briefly disposed of. Petitioner's point seems to be based on the ruling of the Court of Appeals which affirmed the judgment of the District Court on the ground "that there

was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General" (R. 73). The Court went on to make it clear that it was not saying that the value of respondent's product and plan might not be "subject to proof as an ordinary fact", but took the view that "the evidence upon which the Postmaster General acted was not factual evidence but solely in the nature of opinion evidence." (R. 73)

From these statements, petitioner jumps to the conclusion that the Court of Appeals has adopted a rule excluding expert medical testimony from consideration, and that such a rule is erroneous whether or not there is a conflict in the medical testimony (petitioner's brief, pages 33-42).

Actually, this argument of the Government,—which was not advanced in the Court of Appeals,—is at best based on a misapprehension of the meaning of the lower court's ruling. The Court nowhere disputed the evidentiary rules so earnestly espoused by petitioner, and we certainly have no quarrel with the cases and text authorities cited by petitioner at page 34 of his brief,—when placed in their proper context. So far as rules of evidence go, the court below did not even discuss the admissibility of the testimony of the Government's doctors in which they rendered their opinions based on their general experience, knowledge, and reading of authoritative works in the field of science here involved. So much for the evidentiary part of petitioner's argument. What the Court of Appeals held was that under the postal fraud statutes, the Postmaster General had no power to issue a fraud order based solely on such opinion evidence. If that is not a justifiable conclusion to be drawn from the **McAnnulty** Case, and a proper rule of law, then this Court's opinion in that case just does not mean what it says.

Petitioner

Finally, ~~respondent~~ complains that the opinion of the Court of Appeals would require "specific tests" of re-

spondent's product and plan in order to prove fraud; that "danger to life . . . lurks" in such tests, and that "the American public should not be made experimental animals" by subjecting them to such tests (petitioner's brief, page 35).

Here petitioner's shift of emphasis to the alleged danger of respondent's plan is seen in its most exaggerated and frenzied aspect. We have already demonstrated that the charge of danger was directed **solely** at the reduction in weight which respondent says his plan will accomplish, and not at Kelp-I-Dine or the items of food contained in respondent's suggested diet. We have also shown how little significance was attached by the Post Office Solicitor in his Memorandum, and by the courts below, to respondent's use of words like "safe" and "harmless".

Perhaps the most striking indication of the lack of justification for the Government now to place so much emphasis on this minor phase of respondent's advertising is the complete absence of any proof of harm that has befallen anyone using respondent's product and plan. Respondent at the time of the hearing had been selling his product and plan for some time. He had already received thousands of letters from users, a great many of whom said that their doctors had approved (R. II 152-3). Yet at the hearings, **not one case of harm caused by either Kelp-I-Dine or the recommended diet was presented.** And in the intervening years since the hearing, respondent has continued to market his product and plan. He certainly would not have been permitted to do so by the various Government agencies having jurisdiction in the field of food and drugs, if danger to life lurked in every package and circular, as petitioner would have this Court believe.

However, it should be noted that the Court of Appeals never required the American public to be made "experimental animals". After ruling that "there was no sub-

stantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General", the Court went on to state (R. 73):

"* * * We would not be understood to say that the value of the [respondent's] plan and product is not subject to proof as an **ordinary fact** nor that **scientific research and tests** may not disclose **factually and definitely** the efficacy of a particular plan or product. * * * **If there be ordinary factual evidence** of the value of the product and plan here involved it was not placed before the Postmaster General. The proceedings in the Post Office Department do not disclose that any **scientific test or research** was made * * *."

Obviously in the foregoing portion of its opinion, the Court meant to indicate that in its view of the **McAnnulty Case**, the efficacy or inefficacy of a medical remedy **might** be provable by **factual evidence**. "Research and tests" **might** be one way of accomplishing such proof. The Court was not undertaking to tell the Postmaster General exactly how to make out a case under the postal fraud statutes. Even the terms "scientific research and tests",—and the Court did not restrict the Postmaster General to these forms of proof,—would not compel experimentation on human beings.

And the Court indicated that in a particular case, factual proof of inefficacy might not be possible. As we shall show, that would not, as petitioner argues, "effectively strangle consumer protection by federal administrative agencies" (petitioner's brief, page 34). Other agencies of the Government, having more flexible procedures and invoking less drastic sanctions have, by virtue of these differences, and by virtue of differences in the legislative authority under which they operate, been accorded greater freedom of action in fields of regulation coincident with that of the Post Office Department. Certainly,—entirely apart from the complete absence of even a reference in this Rec-

ord to any such assertion as the Government makes for the first time in this Court,—the cases cited by the Government itself, as we shall demonstrate, show that petitioner's concern is unjustified and that there is no foundation for its cry that the decision of the Court of Appeals "will effectively cripple action not only by the Postmaster General, but also by the Federal Trade Commission and the Food and Drug Administration, against sellers of fraudulent nostrums and remedies" (petitioner's brief, page 42).

In any event, it is clear that the Court of Appeals was not requiring any specific type of factual proof. It merely refused to make new law by permitting the drastic remedy of a fraud order to be applied to a situation where there was no more than the conflicting opinions of doctors based only on general knowledge in a field where opinions differ as to the effectiveness of a medical remedy.

The Government's own medical witness explained how the Court's requirements **could** be met, and gave his implicit approval of those requirements. Dr. Roberts was asked whether he would change his mind about the effectiveness of kelp in treating obesity if "leading physicians [naming some] have stated in treatises that they have used kelp (they call it fucus) in the treatment of obesity * * *" (R. II 67). Dr. Roberts replied (R. II 68):

"In order to make me change my opinion about the value of using **this or any other drug or method of treatment** I would not only want a statement of another physician no matter how distinguished, but I would want to critically and carefully see the **results of his treatment.**"

These were the words of a witness who admittedly had never prescribed kelp (R. II 64), although he conceded that other doctors might have done so (R. II 67), who had apparently never heard the word "fucus",—the accepted pharmacological synonym for kelp (R. II 66), who had

never tested kelp (R. II 67), who had merely looked up the term "kelp" in an encyclopedia and some textbooks and had not found it, and who had made no other preparation prior to his appearance as an expert (R. II 64),—not even tasting kelp, as did respondent's witness.

And later, Dr. Roberts stated (R. II 69):

"I don't know of anything that would cause me to change my testimony except, as I said awhile ago, a careful examination of the **scientific experiments which would have to be performed by reputable scientists and physicians under carefully controlled conditions**. I would require information of such experiments and interpretations of those experiments as indicating the value of **this or any other substance** before I would attempt to use the drug as a routine procedure or to recommend its use." (See also R. II 80).

Thus, the Government's witness has clearly gone further than the Court of Appeals in his requirements of proof, and he has imposed these conditions as prerequisites to his changing his own opinion which was based on no tests, no experiments, no study of results of treatment,—but only on general medical knowledge. In effect, he would impose upon respondent the burden of doing what the Government, which **has the burden of proof**, complains is oppressive and dangerous.

In view of all this, can any more weight be attached to petitioner's objections to tests, experiments, and scientific proof than that it is just another of petitioner's frantic but futile efforts to dodge the clear principle of the **McAnnulty Case**, and the sound rule it established?

II.

**CASES CITED BY GOVERNMENT ARE
INAPPLICABLE.**

None of the numerous cases cited in petitioner's brief supports the assertion that the rule established in the **McAnnulty** Case does not apply to the present situation.

In its effort to get-around the controlling language in the **McAnnulty** decision, the Government has cited approximately forty decisions, the great majority of which involve administrative acts of agencies other than the Post Office Department. Thus, at pages 30 to 33 of its brief, the Government has cited fourteen cases involving judicial review of cease and desist orders issued by the Federal Trade Commission pursuant to Section 5 of the Act of September 26, 1914, 38 Stat. 719, or subsequent amendments thereto, 15 U. S. C. Sec. 45 (1946), and at various other places in its brief the Government has cited four similar cases; in addition the Government has cited eight cases involving enforcement of the federal food and drug laws (pages 22, 31-33).

A mere reading of those cases indicates clearly that the courts have gone much further in sustaining the administrative action of the agencies there involved than they have in cases arising under the mail fraud statutes. The **McAnnulty** Case, for instance, is considered in virtually every fraud order case involving a medical remedy, but it is rarely mentioned in decisions reviewing actions of the Federal Trade Commission or in cases of enforcement of the federal food and drug laws. On a legal basis, all those cases are distinguishable and have no place in the consideration of the present situation because they involve different statutory powers permitting a broader basis for administrative action than do the fraud order statutes under the decision of the **McAnnulty** Case.

A. Federal Trade Commission Cases Are Inapposite.

Thus, for instance, Section 5 of the Federal Trade Commission Act originally provided that the Commission could restrain "unfair methods of competition". The amendment of March 21, 1938, 52 Stat. 111, added "unfair or deceptive acts or practices". It takes little argument to demonstrate that the words "unfair or deceptive acts or practices,"—especially in the realm of advertising or labeling in which the cases cited by petitioner fall,—grant the administrator much wider discretion than do the terms "false or fraudulent pretenses, representations, or promises" which form the basis for the exercise of jurisdiction by the Postmaster General under the mail fraud statutes.

Of the many decisions cited by the Government involving Federal Trade Commission orders, passing mention need be made only of the series of **Raladam** cases.¹³ These cases were never before cited by the Government at any stage of these proceedings. Now, for the first time, the Government places almost as great reliance upon them as upon **Leach v. Carlile**, which has hitherto been conceded to be the case upon which the Government's position must rise or fall (see below, page 48, *et seq.*).

It is difficult to understand the sudden emphasis placed upon the **Raladam** cases. First of all, they involve orders of the Federal Trade Commission, and therefore have no bearing upon this case. But furthermore, they are so completely distinguishable on their facts and the manner in which they came before the courts as to merit no consideration in this Court's review of the present case.

In the first **Raladam** Case, the Federal Trade Commission forbade the representation that the product in ques-

13. **Raladam Co. v. Federal Trade Commission**, 42 F. (2d) 430 (C. C. A. 6th, 1930), *aff'd sub nom. Federal Trade Commission v. Raladam Co.*, 283 U. S. 643 (1931); **Raladam Co. v. Federal Trade Commission**, 123 F. (2d) 34 (C. C. A. 6th, 1941), *rev'd sub nom. Federal Trade Commission v. Raladam Company*, 316 U. S. 149 (1942).

tion was a scientific remedy for obesity and forbade advertising of the product as a remedy for obesity unless the statement was added that it was not safe to be taken except under the supervision of a competent physician (42 F. (2d) at 432). The Circuit Court of Appeals reversed the Commission's order on the grounds that whether the remedy in question was "scientific" could not be determined as a matter of fact, and secondly, that the Commission's conclusion that the product was unsafe was based only on the possibility of danger to the exceptional user suffering from certain diseases. The Court pointed out that all that the testimony of the Government's witnesses really meant was that they believed that "no active drug or agent should be by the public self-prescribed or self-administered." The Court went on to state that the same conclusion was "inevitable as to numerous so-called standard remedies sold over the counter to anyone who wants them; not one of them is, according to the standard of safety thus advocated, safe for popular use and consumption" (42 F. (2d) at 434). The Court held that the **McAnnulty Case** and **Leach v. Carlile** were totally inapplicable since they involved a question of fraud not present in a Federal Trade Commission case (42 F. (2d) at 435). Finally, the Court held that the Federal Trade Commission had no jurisdiction.

The Supreme Court granted certiorari, limited to the question of the jurisdiction of the Federal Trade Commission. (282 U. S. 829).

In the course of its opinion, this Court stated that the Commission's power to issue a cease and desist order depends upon the existence of three prerequisites: (1) that the methods complained of are unfair; (2) that they are methods of competition in interstate commerce; and (3) that the proceeding by the Commission is in the public interest. The Court then stated (283 U. S. at 647):

"* * * We assume the existence of the first and third of these requisites; and pass at once to a consideration of the second."

This Court ultimately resolved the jurisdictional question against the Commission, and affirmed the court below.

Some time later the Commission filed an amended complaint charging the company with violations of the Act subsequent to the date of the first cease and desist order, and a second order was issued against certain representations in the company's advertising.

In its second opinion, the Circuit Court of Appeals, in rejecting the company's contention that the issues were *res judicata*, made it clear that the Supreme Court in its first decision had decided only the jurisdictional question and had not ruled upon the lower court's holding that the safe and scientific nature of the product was a matter of opinion rather than fact (123 F. (2d) at 36). The Circuit Court of Appeals then set aside the Commission's order on jurisdictional grounds. This Court reversed, on the ground that the Federal Trade Commission had jurisdiction. At the conclusion of this Court's opinion (316 U. S. at 152-153), the company's contention that the issues were *res judicata* was briefly discussed and held to be without merit, and the Court pointed out that the company "has not sought in this Court to sustain the judgment of the court below on any other ground." (page 153)

Accordingly, aside from the first decision of the Circuit Court of Appeals, which, if anything, supports our position in this case, the **Raladam** cases stand for nothing except the enunciation of principles as to the jurisdiction of the Federal Trade Commission. Obviously, that has nothing to do with the present case.

B. Cases Involving Federal Food and Drug Laws Are Not Pertinent.

The federal food and drug laws are even more strikingly different from the postal fraud statutes, especially since they have been changed from time to time to reflect changing congressional intent in the light of court decisions,

whereas the postal fraud statutes here involved have not been changed in any respect material to the present case since their passage in 1872.

A review of certain provisions of the food and drug laws, some of the amendments thereto, and a few of the decisions thereunder clearly demonstrates this difference. Section 8 of the Act of June 30, 1906, 34 Stat. 771, provided, *inter alia*, that the term "misbranding" should apply to all drugs or articles of food, the package or label of which bears any statement regarding such article, or the ingredients or substances contained therein, "which shall be false or misleading in any particular", and then went on to provide that a drug should be deemed to be misbranded if it was an imitation of another article or if the package failed to bear a statement of the quantity or proportion of certain named ingredients.

In **United States v. Johnson**, 221 U. S. 488 (1911), this Court held that the foregoing provisions were aimed, not at all false or misleading statements in connection with drugs, but only at such as determine the identity of the drug, possibly including its strength, quality and purity. Accordingly, statements as to the effectiveness of a remedy to cure cancer were held not within the proscription of the Act.

In 1912, the Act was amended (Act of Aug. 23, 1912, 37 Stat. 416), to add as a ground for finding that a drug was misbranded the condition that "its package or label shall bear or contain any statement * * * regarding the curative or therapeutic effect of such article * * * which is false and fraudulent."

It might be argued that cases arising under the 1912 amendment have some pertinence here because, as in postal fraud cases, fraud was an essential element of proof on the part of the Government. However, the three cases cited by the Government which arose under the 1912 amendment are completely distinguishable and can have no bearing on the present case.

Simpson v. United States, 241 Fed. 841 (C. C. A. 6th, 1917), cited at page 31 of petitioner's brief, was a criminal case. The defendant, a graduate physician, represented, *inter alia*, that his product was valuable for the treatment of all nervous diseases, diseases of the brain, spinal cord, and medulla oblongata, and heart troubles. The Court found that there was adequate evidence from which the jury could find "that he ~~knew~~ the falsity of the broad claim made for his compound" (page 845).

Similarly, in **United States v. Dr. David Roberts Veterinary Co., Inc., et al.**, 104 F. (2d) 785 (C. C. A. 7th, 1939), a criminal case under the same Act, the individual defendant, a doctor, admitted that his animal medicines could not accomplish all that he had claimed (page 788), and the Court again stated that it was a justifiable inference from the evidence "that the defendants **knew** the articles did not possess the curative or therapeutic qualities claimed for them" (page 789).

Obviously the pertinent comments of the courts in these two cases, which we have quoted, can have no application to the present case where there has never been any question of the respondent's good faith, nor any averment or finding to the contrary.

Finally, in **Goodwin, et al. v. United States**, 2 F. (2d) 200 (C. C. A. 6th, 1924), so far as the opinion of the Court reveals, the issue was primarily one of jurisdiction and there was no question of conflicting medical opinion involved.

Thus none of the cases cited by the Government under the Food and Drug Act of 1906, as amended in 1912, when fraud was a necessary element of proof, is at all controlling or even applicable here.

Subsequently, in the new Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U. S. C. Secs. 301 *et seq.* (1946), it has been provided clearly and

unequivocally that a drug or device shall be deemed to be misbranded, *inter alia*, "if its labeling is false or misleading in any particular". There follow many additional instances in which misbranding may be found to exist. Thus the coverage of the Act has been materially extended. See **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410, 420 (C. C. A. 9th, 1948).¹⁴ It is now similar in scope to the Federal Trade Commission Act. Accordingly, the remaining five Pure Food and Drug cases cited by the Government at pages 22, 32 and 33 of its brief are distinguishable for the same reason as the Federal Trade Commission cases already discussed in the preceding section of this brief.

We could distinguish on their facts many more of the decisions cited by the Government involving other agencies,

14. Even under the broadened provisions of the Federal Food, Drug and Cosmetic Act, in cases involving misbranding or mislabeling of drugs, the Government in many cases in recent years has actually made elaborate and comprehensive tests of the remedies in question, both in the laboratory and under field conditions. See, *e. g.*, **United States v. 7 Jugs, Etc., of Dr. Salsbury's Rakos**, 53 F. Supp. 746 (D. Minn. 1944), cited at pages 32 and 33 of petitioner's brief. In this case, the Court said, at page 758, "Under the law as it now exists, before a court is warranted in submitting the false or misleading qualities of an assertion of effectiveness to a jury to decide, it must be satisfied that something more is involved than mere differences of opinion between schools or practitioners." See also **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410 (C. C. A. 9th, 1948), page 32 of petitioner's brief. In the latter case, the Court, at page 414, called specific attention to the difference between the meager technical facilities for the determination of medical questions possessed by the Postmaster General and the almost unlimited professional resources available to the agency which carries on investigations in the enforcement of the Federal Food, Drug, and Cosmetic Act.

and could cite other decisions involving those agencies which on their facts directly support our position in this case. See, *e. g.*, **Carlay Co. et al. v. Federal Trade Commission**, 153 F. (2d) 493 (C. C. A. 7th, 1946) (a weight-reducing remedy). However, in view of the differences we have pointed out in the statutes under which those agencies operate as compared with the postal fraud statutes, no purpose would be accomplished by this procedure,—except unduly to extend the length of this brief.

In a larger sense, however, the reason for the difference in the approach of the courts to the Federal Trade Commission cases and also to the food and drug cases, as contrasted with the postal fraud cases, lies in the difference in the permissible sanctions or remedies available to the respective administrative agencies. Under the Federal Trade Commission Act, the Commission may issue a cease and desist order against a method, an act, or a practice. Thus, if a person advertises his product in a manner deemed by the Federal Trade Commission to be unfair or deceptive, the Commission will order him to cease advertising in that manner. Normally, the order will refer specifically to certain words or phrases in the advertisement which the advertiser is required to excise. If the court of appeals, under the statutory review procedure provided in the Act, enforces the order of the Commission, the offender is rarely, if ever, put out of business. He need only conform his advertising with the order, and he is then free to continue to transact business.

Thus, for example, the Government has placed some emphasis on **Irwin et al. v. Federal Trade Commission**, 143 F. (2d) 316 (C. C. A. 8th, 1944), in view of the "most extreme claims" which the manufacturers of the device there involved made for their product (petitioner's brief, p. 40, n. 15). There is no doubt that the manufacturers in that case went extremely far in their claims as to the therapeutic value of their device. Yet the Court, after emphasizing the sincerity of the manufacturers in their beliefs, stated

that an injunctive order preventing the sale of the device in question or restricting its use would have been unjustified. The Court stressed the fact that the Commission did not attempt to prevent the sale of the device or restrict its use for the purpose for which it was designed, but merely ordered the elimination of certain representations which were included in the advertising of the device (143 F. (2d) at 323).

Similarly, in cases arising under the food and drug laws, the administrator normally proceeds by libel in a federal court to seize the offending product or device, or by criminal action against the purveyors of the product or device. There the court action is the primary action and not merely a review of an administrative decision. Accordingly, the defendant is protected by the general rule requiring a decision on the **preponderance of the evidence**,—or, in a criminal case, **proof beyond a reasonable doubt**,—and also by his right to a trial by jury.

In the fraud order cases, however, not only is the order issued upon the authority of a single administrative official, and upon the recommendation of a subordinate in his department, but, more importantly, the order, if enforced, necessarily puts the offender out of business. It is difficult to conceive of a modern business that could exist without the use of the mails. Even if it could, it would have little good will left when its regular mail customers or correspondents of any kind received from the Post Office the letters which they had addressed to that business with the word "**Fraudulent**" emblazoned on the envelope.

G. Postal Fraud Cases Cited by Government Fail to Establish That Present Case Is Not Governed by McAnnulty Case.

We now consider the cases cited by petitioner involving fraud orders issued by the Postmaster General. Although the Government has succeeded in gathering together a con-

siderable number of decisions, a mere reading of them demonstrates that they are impressive only in their number and not in the applicability of the principles enunciated in them. We shall as briefly as possible point out how each of those cases is distinguishable from the present case and from the **McAnnulty Case**.

Thus, in one group of cases, there was no basis in the record for the Court to find any difference of opinion as to the effectiveness of the particular remedy in question. **Cable, et al. v. Walker**, 152 F. (2d) 23 (App. D. C., 1945), petitioner's brief, pages 19 and 31; **Fanning v. Williams, et al.**, 173 F. (2d) 95 (C. A. 9th, 1949), petitioner's brief, pages 23, 32 and 39.¹⁵

Another group of cases cited by the Government are undeniably cases in which, **by standards of an exact science**, the representations made by the offender were clearly false and fraudulent. Thus, in **Elliott Works, Inc., et al. v. Frisk**, 58 F. (2d) 820 (S. D. Iowa, 1932), cited at page 19 of the petitioner's brief, the plaintiff represented that his device charged batteries instantly. The Government proved by tests conducted by the **United States Bureau of Standards**, following directions supplied by the plaintiff, that his device not only did not charge batteries instantly, but **did not charge batteries at all**. Thus, on the basis of **scientific facts ascertainable by pragmatic tests**, the representations contained in the plaintiff's advertising were proved **false and fraudulent as a matter of fact**. In distinguishing the **Mc-**

15. In **Fanning v. Williams**, the Court itself distinguished the decision of the Court of Appeals in the present case, stating (173 F. (2d) 95, 97): "• • • In that case, however, there developed at the hearing a conflict of medical testimony as to the therapeutic value of the product in question. It was apparent that there were two schools of thought among the medical profession and no consensus has as yet crystallized. We have no such situation here. • • •"

Annulty Case, while recognizing its authority, the Court pointed out that "the finding of the solicitor in this case is not based on opinions, but upon a scientific investigation, findings, and tests made by the United States Bureau of Standards" (page 825).

Similarly, in **Farley v. Heininger, et al.**, 105 F. (2d) 79 (App. D. C. 1939), cited in petitioner's brief at pages 18 and 30, plaintiff advertised that he could fit people needing false teeth by wax impressions made by them at home, and that the teeth would fit well, improve the appearance of the wearer, etc. An investigator for the Government who had actually visited fifty customers of the plaintiff, testified that **not one** had received properly fitting and functioning teeth. Test sets of teeth ordered by Government agents were examined at the hearing, and it was apparent to the naked eye that they did not fit (page 82). Accordingly, the Court had before it representations as to physical facts and testimony proving the falsity of those representations as an undeniable fact. As the Court pointed out at page 84, unlike the representations in the **McAnnulty** Case, those here were "easily susceptible of demonstration and of proof".

In **Farley v. Simmons**, 99 F. (2d) 343 (App. D. C. 1938), cited in the petitioner's brief at page 18, the plaintiff advertised booklets and books in a manner calculated to create the impression in the reader's mind that he would get "sexy" reading material. Actually, there was no dispute that the material received by the buyer was of a non-salacious and non-obscene nature. As the Court pointed out at page 346, this case bore no similarity to the **McAnnulty** Case because the representations and promises in the **Simmons** Case did not lie in any field of scientific or pseudoscientific knowledge, and once it was established that the plaintiff represented his material to be of a salacious nature, there was no question, as a clearly-established fact, that the representation was untrue.

Similarly, **Putnam v. Morgan**, 172 Fed. 450 (S. D. N. Y. 1909), cited at page 19 of petitioner's brief, has no application to the present case. There the plaintiff advertised that for ten cents she would furnish a cake of soap and give away a new safety razor outfit free to any such purchaser of soap. The questions were, first, whether this was fraudulent in view of the fact that she regularly sold the soap for two cents and, second, whether the representation as to the safety razor outfit was false since she sent the purchaser only a safety razor. Obviously, there was no room in that case for a conflict of **medical** opinion such as exists in the present case and existed in the **McAnnulty Case**.

Next, in **Branaman v. Harris**, 189 Fed. 461 (W. D. Mo. 1911), cited in petitioner's brief at pages 19 and 33, the plaintiff advertised a cure for deafness. He purported to specify certain symptoms which would indicate a type of deafness incurable even by his remedy, and represented that if replies from prospective patients indicated the presence of these symptoms, he would not accept those cases. The Government sent thirteen test letters, each of which clearly contained reference to these symptoms of incurable deafness, and the plaintiff nevertheless diagnosed each case as one in which his remedy would effectuate a cure. Obviously, the fraud in this case consisted of the plaintiff's willfully erroneous diagnoses (page 470), which constituted clear fraud with respect to his representation that he would not undertake to accept such incurable cases. The Court pointed out that the charges preferred by the Post Office Department did not involve solely matters of opinion, since in the Memorandum submitted to the Postmaster General, it was clearly stated that the department **did not undertake to decide the scientific question of the purported use of electricity for deafness** (page 467). Thus, there is no similarity to the present case in which the Government's principal finding, expressly based upon the medical opinion alone, was that plaintiff's remedy is totally ineffective in the treatment of obesity.

Aycock v. O'Brien, 28 F. (2d) 817 (C. C. A. 9th, 1928), cited in the petitioner's brief at page 19, involved a fraud order issued against the promoter of medicinal remedies for tuberculosis and other maladies. The plaintiff refused to testify as to the constituents of his remedies. He compared himself to Jesus Christ in that he did not know how his remedies effected results but only knew that they did effect results. The Court found that there was sufficient evidence to impeach the plaintiff's moral integrity in asserting his good faith and **his own belief in the efficacy of his remedies**. The plaintiff himself admitted that he once believed his medicine was a specific for tuberculosis of the lungs, but **did not so believe any more**. Accordingly, the plaintiff himself could be found not to believe the representations which he made, so that there was no room for dispute as to the effectiveness of his remedy. **His own mental state was fraudulent as a matter of fact**. There is no such contention in the instant case.

Three other postal fraud cases cited by the plaintiff require only passing comment. **Donaldson v. Read Magazine, Inc., et al.**, 333 U. S. 178 (1948), cited in petitioner's brief at pages 18 and 20, involved representations made by a magazine in the advertisement of a puzzle contest. It had nothing to do with a medical remedy or any other scientific subject. **Pike et al. v. Walker**, 121 F. (2d) 37 (App. D. C. 1941), and **Summers v. McCoy**, 163 F. (2d) 1021 (C. C. A. 6th, 1947), cited at page 31 of petitioner's brief, were included by the Government in long lists of citations, but obviously were not strongly relied upon for the reason that in neither case were any of the facts stated by the Court, nor were the principles here involved even mentioned.

1. **LEACH v. CARLILE DISTINGUISHED.**

We come then to the decision upon which the Government principally relied in the courts below, and to which it accords paramount weight in its brief filed with this Court.

The Government contends that the ultimate error committed by the courts below was that they disregarded and failed to follow **Leach v. Carlile**, 258 U. S. 138 (1922). The Government's contention is that **Leach v. Carlile** and not the **McAnnulty** Case governs the present situation. This is really the legal question to be decided by this Court.

The courts below flatly discarded this contention (R. 61 and 72), and we submit that in applying the principles of the **McAnnulty** Case rather than the decision in **Leach v. Carlile**, the courts were clearly correct.

For a proper understanding of **Leach v. Carlile**, it is necessary to consider first the opinion in the Circuit Court of Appeals for the Seventh Circuit [267 Fed. 61 (1920)], since the facts and the reasoning leading to the decision by the Supreme Court of the United States are there more fully set forth.

Plaintiff advertised a remedy for sexual weaknesses and disorders in men. A fraud order was issued against him and he sought to enjoin its enforcement. The Circuit Court of Appeals pointed out that much evidence was adduced and many authorities cited both ways as to the effectiveness of the type of remedy advertised by the plaintiff, and concluded that there was a real difference of opinion on this question (page 63).

The Court unequivocally recognized that the **McAnnulty** decision required the issuance of an injunction against enforcement of a fraud order based solely upon a finding of total ineffectiveness of a medical remedy, as to the effectiveness of which there was a difference of opinion. In this regard, the Court stated (pages 63-64):

"It was not the design of these statutes to vest the Postmaster General with authority to determine between contradictory views held in apparent good faith upon a subject the merits or demerits of which may fairly be said to be a matter of opinion among those who ought to know. American School of Mag-

netic Healing v. McAnnulty * * *. It would follow that, if the order herein is sustainable only upon the inefficacy and absolute want of remedial virtue of the substance which appellant sells, the injunction should have issued."

However, the Court stated that "any so-called remedy, however meritorious, may in its exploitation become a subject-matter of fraud". Here the advertisement in question contained such grossly extravagant and unwarrantedly optimistic representations, in a letter and a twenty-page booklet, that the findings of the Postmaster General that those representations were fraudulent had to be sustained. Thus, the plaintiff represented, among other things, that his remedy was being recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline, weakened manhood, urinary disorders, lame back, lack of ambition, energy, sleeplessness and rundown system; that the ingredients could be obtained only in plaintiff's product; that the remedy was compounded in one of the largest and best laboratories in the world, etc.

With regard to these and similar assertions, the Court stated (page 67):

"The record does not warrant the conclusion that even appellant believed such broad assertions, nor that he was a physician or a scientist, or had conducted experiments or investigations; and it does not appear that he had basis for any belief whatever on the subject. * * *"

Accordingly, we have in the cited case representations which were obviously false and which the administrator could find even the plaintiff did not believe. It was on this ground that the Circuit Court of Appeals affirmed the decree of the District Court denying an injunction against enforcement of the fraud order.

The good faith of plaintiff in the present case was not questioned in any respect whatever,—as indeed it could not have been.

In the Supreme Court of the United States, the distinction between **Leach v. Carlile** and the **McAnnulty** Case was clearly set forth by Mr. Justice Clarke as follows (258 U. S. at 139):

“ * * * In argument it is contended that the question decided by the Postmaster General was that the substance which the appellant was selling did not produce the results claimed for it, that this, on the record, was a matter of opinion as to which there was conflict of evidence, and that therefore the case is within the scope of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public. This was a question of fact which the statutes cited committed to the decision of the Postmaster General * * * ”

In the present case, the Postmaster General has himself taken the case out of the rule set forth in **Leach v. Carlile** and placed it within the principles of the **McAnnulty** Case by the finding upon which the fraud order was primarily based, namely, that respondent's remedy was totally ineffective and valueless in the treatment of obesity. The Circuit Court of Appeals in **Leach v. Carlile**, clearly recognized that if that was the ground of the fraud order, the **McAnnulty** Case would have compelled the issuance of an

injunction against its enforcement. And it was clearly unnecessary for the Supreme Court of the United States, in affirming the Circuit Court of Appeals, to express an opinion on this point because that was plainly **not** the ground upon which the fraud order was issued.¹⁶

The Court of Appeals in the present case (R. 71-72), gave full consideration to **Leach v. Carlile** and distinguished it on the grounds set forth above. The Court stated that,—unlike **Leach v. Carlile**,—in the present case, “The record is entirely barren of any charge by the Government that the ‘Kelp-I-Dine’ advertisements raised hopes of a cure-all panacea” (R. 72). Furthermore, said the Court (R. 72):

“ * * * There is no indication in the record at all, that the Government intended to make any such charge and there is no substantial evidence to support such a finding. The basis for the ‘fraud order’ was that kelp is valueless for the treatment of obesity while the advertisements lead one to believe that it is valuable for such purpose. The Postmaster General allegedly

16. **Missouri Drug Co. v. Wyman**, 129 Fed. 623 (E. D. Mo. 1904), cited at page 19 of petitioner’s brief, was decided by the same district court which was reversed in the **McAnnulty** Case. The facts and the decision are strikingly similar to those in **Leach v. Carlile**. Here plaintiff advertised that his remedy was the only known cure for lost manhood and the only known specific that would cure lost manhood in all its forms and conditions; that there was no other cure in the world that would do this; that plaintiff was “one of the largest chemistries” in the United States; that there was no case that plaintiff’s remedy would not cure permanently; that all physicians knew the reputation of plaintiff and knew that when plaintiff sponsored a remedy, the remedy must be as represented. The Court found that, **aside from any question of opinion as to the effectiveness of the remedy**, the Postmaster General had the power to find these statements false and to base his fraud order upon such findings.

found as an ordinary fact that kelp has no value for the specified purpose, but there is nothing to indicate that he found the advertisements asserting cure-all results." 17

The Record in this case fully demonstrates, as we have shown, the inapplicability of **Leach v. Carlile** and the correctness of the court below in considering the **McAnnulty** decision as binding.

We have already pointed out (pages 27 to 30 of this brief) that there were only a few minor representations in respondent's advertising that were even considered in the Solicitor's Memorandum to the Postmaster General. These involved the ease and safety of following respondent's plan. We have demonstrated that the Solicitor's remarks as to these items in respondent's advertising could not possibly of themselves support a fraud order, and the Solicitor nowhere indicated that they were material in leading him to his ultimate finding of fraud. That finding was based on the Solicitor's opinion that respondent's product, as distinguished from the suggested diet which was part of his reducing plan, was valueless in the treatment of obesity.

Thus we return once more to **American School of Magnetic Healing v. McAnnulty**. All of petitioner's efforts in both courts below to get around the effect of that decision

17. Respondent's advertising included a guarantee that "if you find Kelp-I-Dine does not help you lose weight, return the remainder to us and we will refund your money in full" (R. 16). This was plainly an implicit reservation that respondent's plan possibly did not work in all cases and might not be universally beneficial in the treatment of obesity. Such a money-back guarantee has been a factor in distinguishing **Leach v. Carlile**, and in affirming the issuance of an injunction against the enforcement of a fraud order in a case involving a medical remedy. **Jarvis v. Shackelton Inhaler Co.**, 136 F. (2d) 116 (C. C. A. 6th, 1943), cited at page 19 of petitioner's brief.

have been of no avail. We have shown why. The **McAnnulty** decision clearly covers the facts of the present case, and no other decision cited by petitioner here or below does so. The principle of the **McAnnulty** decision, as applied by the Court of Appeals, is a salutary restriction upon the unparalleled administrative power which the Postmaster General has sought to exercise in this case.

And it is perfectly apparent that petitioner's fear that adoption of the principles of the **McAnnulty** Case here will "effectively cripple action" by the Federal Trade Commission and the Food and Drug Administration in the field of medical remedies is groundless. It is obvious, from a mere reading of a few of the Federal Trade Commission and Food and Drug Administration decisions in the field of medical remedies, that those agencies have not been and will not be retarded in their enforcement programs by the **McAnnulty** Case or by the decision of the Court of Appeals in this case. If the Postmaster General is retarded by either decision, it is only in a field which he has been forbidden to occupy since 1902, with the apparent sanction of the Congress, which, while broadening the scope of the enforcement powers of governmental agencies under other statutes encompassing fraudulent or misleading medical remedies, has done nothing since 1872 to widen the scope of the mail fraud statutes.

CONCLUSION.

The fraud order in this case would unquestionably put the respondent out of the business in which he has been engaged for many years. Clearly, he could not survive without resort to mail service,—the "highway over which all business must travel". **Esquire, Inc. v. Walker**, 151 F. (2d) 49, 51 (App. D. C. 1945), *aff'd sub nom. Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946).

In **American School of Magnetic Healing v. McAnnulty**, the Supreme Court enunciated the clear principle that

where, as here, the basis for a fraud order is an administrative finding of total ineffectiveness of a medical remedy as to which there is a conflict of opinion, the Postmaster General has exceeded his statutory powers. At its worst, the instant case is plainly not one so shocking in the elements of fraud and danger to the public welfare as to call for a departure from the clear meaning of the **McAnnulty** decision.

In the **Esquire** Case, the Supreme Court denied to the Postmaster General the right to exclude a magazine from the second-class mail privilege on the basis of his opinion that the magazine did not contribute to the public good or welfare. While that case did not arise under the statutory provisions here involved, the opinions of both the Court of Appeals for the District of Columbia (151 F. (2d) at 54) and of the Supreme Court (327 U. S. at 157) indicate a resurgent tendency to limit the tremendous power of the Postmaster General, at least where the exercise of that power is based solely on his opinion in a controversial field.

In his opinion for the lower court in the **Esquire** Case, Justice Arnold, perhaps somewhat facetiously, suggested that the Post Office officials be limited "to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds'" (151 F. (2d) at 55). We shall not presume to venture that far. We here urge only that the exercise of the Postmaster General's power be restricted to cases where it can be pragmatically ascertained as a fact, and not merely on the basis of an administrative choice between conflicting opinions, that there is present a "scheme or device for obtaining money . . . through the mails by means of false or fraudulent pretenses, representations, or promises". Rev. Stat. Sec. 3929, as amended, 39 U. S. C. Sec. 253 (1946).

For the foregoing reasons, we respectfully urge the Court to affirm the decision of the court below.

At the very least, the Postmaster General should be instructed to rehear this case, and to permit respondent to cross-examine the Government's medical experts by reference to written authorities in the field, as well as to introduce such recognized text authorities as substantive proof of the existence of conflicting medical opinion as to the efficacy of kelp in obesity cases, and to introduce such rebuttal medical testimony as may then appear appropriate.

Respectfully submitted,

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Appendix.

REVISED STATUTES § 3929, AS AMENDED.

39 U. S. C. § 259 (1946).

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

**REVISED STATUTES § 4041, AS AMENDED,
39 U. S. C. § 732 (1946).**

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

No. 31.

JESS LARSON, as War Assets Administrator and Surplus
Property Administrator, *Petitioner*

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING AND ALTERNATIVE
MOTION TO AMEND JUDGMENT AND MANDATE.

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.,
Attorneys for Respondent.

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OF APPEALS FOR THE DISTRICT OF COLUMBIA

**PETITION FOR REHEARING AND ALTERNATIVE
MOTION TO AMEND JUDGMENT AND MANDATE.**

Respondent, the Domestic & Foreign Commerce Corporation respectfully petitions the Court for a rehearing of this case, or in the alternative respectfully moves that the Court amend its judgment and mandate to allow leave to the District Court to entertain a motion for leave to amend the complaint.

Introduction.

The majority opinion is based upon *Goldberg v. Daniels*, 231 U. S. 218. The paraphrases of the *Goldberg* language contained in the majority opinion, it is respectfully submitted, reveal that the Court must have been misinformed both as to the accurate but abbreviated language thereof; as to the state of the record therein; and as to the view of its author, Mr. Justice Holmes and of his brethren, on its relation to *Goltra v. Weeks*.

Other serious misapprehensions also appear in the majority opinion which it is deemed the Court would also wish to have brought to its attention.

Grounds for the Petition and Alternative Motion.

1. The majority opinion of this Court discloses that it was premised upon a misapprehension of the action taken by the Court of Appeals in this cause.

This opinion (p. 2)¹ assumes that the Courts below *did not decide the question of title* in the following language:

"A second question, related to but different from the question of breach, was *whether legal title to the coal had passed to the respondent when the contract was made*. If the contract required the deposit of funds then, of course, title could not pass until the contract terms were complied with. If, on the other hand, the contract required payment only on delivery of the documents, a question remained as to whether title nevertheless passed at the time the contract was made. Since these questions *were not decided* by the Courts below, we do not pass on them here." (*italics supplied*).

Yet, the majority opinion itself, directly at the top of the same page (p. 2) notes that the Court of Appeals reversed the District Court upon a

¹ All page references are to the pamphlet report of the opinion in the case, decided June 27, Oct. Term 1948, Number 31.

"holding that the jurisdictional capacity of the court depended on whether or not *title to the coal had passed.*" (Italics supplied.)

It is respectfully submitted that the Court of Appeals did decide that title *had passed* upon the only *pleading* before it, and that it reversed the District Court for dismissing the complaint regardless of the fact that it contained an unchallenged allegation of title in respondent.

The Court of Appeals said (165 F. 2d 235 (1947)):

"Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee. . . . If that contract served to vest title immediately in appellant, then it follows that the ruling in Philadelphia Co. v. Stimson is controlling here. . . . *In the complaint appellant asserted that the title to the coal had passed to it (respondent) and appellee, and his agents, was presently engaged in negotiations for the disposition of the coal to party other than the appellant.* Complaint was met only by a motion to dismiss supported only by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. *The allegation should have been treated as admitted.*" (Italics supplied)

Thus the Court of Appeals *had* decided the question of title and found that upon the basis of the only pleading before it that *title was in the respondent.*

A thorough examination of all cases of record reveals that this Court's refusal to pass upon the question of title on the basis of the pleadings before it, *in this type of case,* is unique in the Court's history. The gravity of the misconceptions that can arise from this action is practically limitless; it sweeps away all the careful limitations with respect to a citizens property inherent in the whole American doctrine of sovereign immunity as enunciated by this Court throughout the years.

4

(2) The majority opinion bases the decision of this case squarely upon the authority of *Goldberg v. Daniels*, 231 U. S. 218 calling upon it for the proposition that the rule has always been to disregard location of title and dismiss any complaint *regardless* of an allegation of title in the citizen.

The majority opinion here deemed the *Goldberg* case to stand for the following propositions: (Page 17).

"Suit must fail as one against the United States, the Court said, whether or not the sale was complete. In so holding, the Court said, in effect, that the question of title was immaterial to the Court's jurisdiction. Wrongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." (Italics supplied).

Nowhere in the *Goldberg* case is there any language suggesting that the suit must fail *whether or not* the sale was complete. On the contrary, the Court *specifically* held, as its *only* ground of decision, *that title was in the United States*. Consequently the United States was a necessary party and there could have been *no* sale.

The exact language which Mr. Justice Holmes used was

"the United States is the *owner* in possession of the vessel" (231 U. S. 218). (Italics supplied.)

He also said that they saw

"no sufficient reason for throwing doubt upon the premise" (ibid.)

of the lower Court's decision; instead of, as the majority opinion misapprehends (at p. 17), it being

"expressly held that it was not necessary to decide whether the lower Courts were correct".

The lower Court had held that there had been no acceptance of the offer and therefore no sale; that the acceptance

of Goldberg's bid, because it was a mere offer (not a contract) could not be compelled upon the Secretary of the Navy. Justice Holmes merely had a more logical way of saying that title had not passed. If title has not passed, it is in the United States; and the immunity of the sovereign is then prior in logic to other reasons for denying relief.

Respondent cannot see how passage or non-passage of title did not enter into the decision of *Goldberg* when the sole reason that Justice Holmes gave for his opinion was *title in the United States*. Yet, this Court now says that location of title was "immaterial" there. It is submitted there is no escape from Holmes' meaning that title was *not* in Mr. Goldberg; and that this was the sole and controlling ground for the unanimous decision therein.

(3) The majority opinion (p. 18) perceives a conflict between the result of the *Goldberg* case and the theory of *Goltra v. Weeks*, 271 U. S. 536. It then would resolve that conflict by overruling the doctrine of the *Goltra* case.

It is respectfully suggested that before overruling an authority of the impressive stature of the *Goltra* case, the Court reexamine the *Goldberg* case and its relation to *Goltra*.

None of the members of the Court on the *Goltra* bench perceived any conflict, although the *Goldberg* case was cited in the briefs before it. Any assumption of conflict between the two cases would make it necessary to assume that Justice Holmes misunderstood his own opinion in *Goldberg* because he himself announced the opinion of the Court in both the *Goldberg* and *Goltra* cases, although the latter opinion had been prepared by Chief Justice Taft.²

(4) The majority opinion (pages 19, 20) in discussing the authority of the petitioner to construe his sales contract under the disposal statute in question says that:

² *Goltra v. Weeks*, 271 U. S. 536, at 538 footnote:

"Mr. Justice Holmes announced the opinion of the Court, the Chief Justice being absent."

"His action in doing so in this case, was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong, and that title to the coal had, in fact, passed to the respondent under the contract".

The doctrine thus enunciated is so broad and sweeping a change of the American doctrine of sovereign immunity that it subjects any of the billions upon billions of dollars worth of property *formerly* owned by the United States to seizure and condemnation at the pleasure of any disposal officer. The citizen is thereby limited to his statutory remedy in the Court of Claims for only the *reparable* portion of his damage, without any regard whatever to the *irreparable* portion of the citizen's damage which the courts of the land are hereby rendered powerless to remedy.

It is to be noted that the reparable portion of damage of citizens is remediable only as long as the Tucker Act stands unrepealed and the Congress continues to appropriate the money therefor.

Moreover, the decision means, from a practical standpoint, that no one can enter a property contract with the United States with any degree of certainty or firmness of contract. Instead of buying unique property, the citizen is buying a lawsuit in the Court of Claims, if this is the whim of the disposal officer,

The disposal statute here concerned confers authority to *sell* only. There is no authority to *unsell* or *condemn* under the disposal statute.

It is respectfully submitted that the results of this decision, cutting off all of respondent's irreparable damage, and the theory and far reaching consequences of the doctrine here enunciated; which sanctions lawless conduct to the extent that an officer acts under misconception of the law, are of sufficient importance to merit reargument of this cause before the *full* bench of this Court.

(5) Throughout the majority opinion there are frequent remarks on the fact that allegations of unconstitutionality lack of official authority, etc. are not made in the complaint.

Respondent's counsel believed that such legal conclusions were not well pleaded and the complaint here therefore, alleged only the ultimate facts necessary to soundly base and support these legal conclusions. But it now appears these conclusions must be pleaded as fact.

Therefore it is respectfully requested that if the petition for reargument is denied, this Court amend its mandate and judgment to allow leave to the District Court to entertain a motion for leave to amend the complaint, or such other and further relief of this nature, as the Court shall deem proper in the premises.

Respectfully submitted,

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.

Certificate of Counsel.

We, counsel for petitioner, certify that the foregoing petition is presented in good faith and not for delay, and that in our opinion it is well founded.

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.

July, 1949.